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Supreme Court, U.S.
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NO. 92 -

IN THE

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, JUSTICE OF THE
PENNSYLVANIA SUPREME COURT

HONORABLE ROLF LARSEN, PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the commingling of the investigative, prosecutorial and adjudicative functions in the quasi-criminal proceedings before the Pennsylvania Judicial Inquiry and Review Board violated the due process and equal protection guarantees of the U. S. Constitution and thus deprived the petitioner, Justice Rolf Larsen, of a fair and impartial hearing?

2. Whether, under the provisions of the United States Constitution, the petitioner Justice Rolf Larsen's constitutional right not to be twice placed in jeopardy and subject to multiple prosecutions on the same quasi-criminal charges was violated when the Pennsylvania Judicial Inquiry and Review Board unilaterally terminated the original hearing during the defense stage thereof and required the petitioner to re-defend the original charges ab initio in a consolidated hearing with new and unrelated quasi-criminal charges before a new hearing tribunal to which additional members were added?

3. Whether the Judicial Inquiry and Review Board's action in adding three new, unrelated charges (nos. III, IV and V) to the two original charges during the hearing on the original charges deprived the petitioner of his fundamental right to due process and equal protection of law under the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

Honorable Rolf Larsen, Justice of the Pennsylvania Supreme Court, Petitioner herein, Respondent below

Pennsylvania Judicial Inquiry and Review Board, Petitioner-Prosecutor below

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IN THE MATTER OF THE
HONORABLE ROLF LARSEN,
JUSTICE OF THE PENNSYLVANIA SUPREME COURT
Honorable Rolf Larsen, Petitioner.

PETITION FOR WRIT OF CERTIORARI

Petitioner above named respectfully prays that a writ of certiorari issue to review the Per Curiam Order of two Justices of the Pennsylvania Supreme Court, entered in this case on October 14, 1992, petition for reargument denied, by Per Curiam Order of two Justices of the Pennsylvania Supreme Court dated January 22, 1993.

OPINIONS BELOW

Per Curiam Order of two Justices of the Pennsylvania Supreme Court dated January 22, 1993, denying petitioner's Application for Reargument. Order is reprinted in Appendix at p.1.

Per Curiam Order of two Justices of the Pennsylvania Supreme Court dated October 14, 1992, adopting Part II of the Report of the Judicial Inquiry and Review Board which recommended that petitioner receive a public reprimand. Justice Papadakos filed a Dissenting Statement. This order

is reported at 616 A. 2d 259 (Pa. 1992) and is reprinted in the Appendix at p.7.

Report of JIRB to the Supreme Court of Pennsylvania, Part I, filed July 17, 1992. Report, Part I is reprinted in the Appendix at p.74.

Report of JIRB to the Supreme Court of Pennsylvania, Part II, filed July 17, 1992. Report Part II is reprinted as part of the Per Curiam Order of October 14, 1992 in Appendix at p.7.

Dissenting and Joining Report of Judge Munley, filed July 17, 1992. The dissenting and joining report is reprinted in the Appendix at p.104.

JURISDICTION

The Per Curiam Order of two Justices of the Pennsylvania Supreme Court printed in the Appendix at p.7, was entered on October 14, 1992. On January 22, 1993, two Justices of the Pennsylvania Supreme Court denied petitioner's application for reargument which is printed at Appendix p.1. Jurisdiction in this Court is established by 28 U.S.C. sec. 1257(a). The time for filing this petition was extended to May 13, 1993, by order dated April 21, 1993 entered by Justice David H. Souter.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendent.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added).

Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Justice Rolf Larsen, is a sitting Justice of the Pennsylvania Supreme Court. On May 24, 1988, the petitioner was formally charged by the Pennsylvania Judicial Inquiry and Review Board (JIRB) [1], with two counts of violating the Canons of the Code of Judicial Conduct, in a quasi-criminal proceeding.[2] The petitioner was charged in relevant part with: violating the Judicial Code by allegedly engaging in an *ex parte* contact with Common Pleas Court Judge Eunice L. Ross concerning a proceeding involving the Estate of Homer Douglas Francis then pending before her.

The JIRB is a governmental body established by the Pennsylvania Constitution (Art. 5, sec. 18) (See Note 1). The JIRB is invested by the Pennsylvania Constitution with the responsibility of investigating behavior of members of the Pennsylvania Judiciary, holding hearings and, if warranted, recommending, to the Pennsylvania Supreme Court, sanctions of suspension, removal, discipline and/or compulsory retirement of justices and judges. Upon receiving such a recommendation the Pennsylvania Supreme Court is obliged to make a de novo review and arrive at its own independent

[1] Article 5, sec. 18 of the Pennsylvania Constitution, which establishes the Judicial Inquiry and Review Board, provides in part as follows:

> (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.
>
> (b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. . . . The board shall act only with the concurrence of a majority of its members.
>
> • • • •

[2] The Pennsylvania Supreme Court has held that proceedings conducted by the JIRB are "quasi- criminal" in nature, and that a respondent-jurist before the JIRB is clothed with all of the fundamental constitutional rights afforded to criminal defendants. *Matter of Chiovero*, 524 Pa. 87, 570 A.2d 57 (1990).

conclusion. If the JIRB exonerates the accused justice or judge of the charge or charges, then the JIRB's determination of exoneration is final and unreviewable. *First Amendment Coalition vs. Judicial Inquiry and Review Board,* 501 Pa. 128, 460 A. 2d 722 (1983).

In September, 1987, Judge Eunice L. Ross made a complaint to Robert L. Keuch, Esquire, the Executor Director, Board Counsel and prosecutor of the JIRB that the petitioner had engaged in an *ex parte* contact with her on May 30, 1986, some 16 months prior to her making the complaint. At the time she made the complaint, Judge Ross was a member of the JIRB and she had participated, as a member of the JIRB, in the investigation and the gathering of the evidence against the petitioner. Judge Ross then testified as the principal witness against the petitioner in a hearing conducted by her fellow JIRB members.

On or about June 15, 1988, the petitioner filed a pre- hearing challenge in the form of an Application for Disqualification of all members of the Judicial Inquiry and Review Board. The application for disqualification of all members of the JIRB was based upon, *inter alia,* the clear assertion that the JIRB, which is a collegial, adjudicatory body and constitutionally acts as a unit, could not fairly and impartially judge the credibility of Judge Eunice L. Ross, one of its own members. The petitioner argued to the JIRB that no tribunal can fairly or impartially sit in judgment of part or all of its own credibility; nor can any tribunal separate itself into "good parts and bad parts" because the "bad parts" irrevocably contaminate the whole. A copy of the petitioner's Application for Disqualification of all Members of the Judicial Inquiry and Review Board is reprinted in the Appendix at p.151. The petitioner's said application for disqualification was summarily denied without a hearing by the JIRB.

On or about, July 29, 1988, the petitioner filed an Application for Writ of Prohibition and/or Application for Extraordinary Relief along with an Application for Stay of Judical Inquiry and Review Board Proceedings Pending Dispositon of the Applications for Writ of Prohibition and for Extraordinary Relief in the Supreme Court of Pennsylvania. In that application, the petitioner argued, *inter alia*, that his right to a fair and impartial hearing was rendered impossible by

the commingling of the investigatory, charging, prosecutorial, fact-finding, adjudicative and judicial functions in the JIRB. Judge Ross was at all times the complainant, a member of the JIRB, an investigator, an initiator of charges and a witness. The same members of the JIRB who investigated the complaint and voted to charge the petitioner then proceeded to hear and receive the testimony and evidence on the charges which they decided to bring. (Judge Ross recused herself from participating in the main hearing phase of the proceedings except to appear as the principal witness.) The petitioner argued that the extensive commingling of functions had the effect of denying him due process of the law before a fair and impartial tribunal and equal protection as quaranteed by the Fourteenth Amendment of the federal constitution. The petitioner application for a Writ of Prohibition, etc. was summarily denied without a hearing. A copy of the said Application for Writ of Prohibition, etc., and a copy of the court's said order denying the relief sought are reprinted in the Appendix at p.162, and p.181, respectively.

The evidentiary hearings in this matter commenced on August 23, 1988, before a three member hearing committee of the JIRB. After ten days of hearings (August 22, 23, 24, 29, 30, 31, September 1, 12, 13 and 14), 13 witnesses for the JIRB, 16 witnesses for the petitioner, 45 exhibits for the JIRB, 41 exhibits for the petitioner, 1,704 pages of testimony, and stipulated testimony furnished on behalf of the petitioner in writing by 18 additional character witnesses, and after the JIRB had rested its case and the petitioner had started his defense, a recess was called by the hearing committee. The hearings were to resume on Wednesday, October 5, 1988, at which time the petitioner would continue to present the remainder of his defense.

On October 3, 1988, two days before hearings were to resume, the JIRB, acting through the Executive Director/Board Counsel-prosecutor, Robert L. Keuch, and three of its members, who were not serving on the original three-member hearing committee, acting *ex parte,* filed three new unrelated charges (Charges III, IV and V) against the petitioner. These three new unrelated charges were added to the two original charges. The three new charges alleged that

the petitioner had violated the Code of Judicial Conduct by alleged conduct which was totally unrelated to charges I and II. The new charges III, IV and V, involved allegations pertaining to entirely different times, places, subject matter and parties from the times, places, subject matter and parties allegedly involved in the formal charges I and II then being heard by the hearing committee. The hearing committee members, who were hearing the initial formal charges I and II, were informed by Mr. Keuch and the other members of the JIRB of the three new charges made against the petitioner. This disclosure irreversibly polluted the hearings and the petitioner was irreversibly prejudiced thereby.

The petitioner, through his counsel, orally objected on various grounds to the filing of the three new unrelated charges. Included in his objections was the denial of due process and the undeniable prejudice caused by the joinder of entirely new and unrelated charges. On October 10, 1988, oral argument on petitioner's objections was held before a specially convened six-member-panel of the JIRB which included the three members of the original hearing committee. The following day, October 11, 1988, the specially convened six member panel of the JIRB issued an order overruling petitioner's objections, and ordered the hearing committee, then conducting hearings on charges I and II, to suspend the hearings on those original charges. The Order further provided:

"In the event the JIRB concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140[3], and all charges shall be heard *ab initio* by the six sitting members." See Appendix at p.286.

On or about October 20, 1988, the petitioner, to supplement a letter of October 13, 1988 in the nature of various pretrial motions and objections to the JIRB order of October 11, 1988 cited above, filed a Supplemental Omnibus Application with the JIRB which, *inter alia,* included an application to dismiss the original charges I and II on grounds of

3 Docket Number 140 is the docket number assigned to petitioner's case by the JIRB.

double jeopardy if the JIRB order of October 11, 1988 cited above was executed. The quasi-criminal hearing on charges I and II which had progressed well into the defense stage was unilaterally and abruptly aborted by the JIRB without necessitous reason and over the strenuous objections of the petitioner. A copy of said Omnibus Application is reprinted, with exhibits omitted, in the Appendix at p.184.

On October 24, 1988, the JIRB ordered a consolidated hearing *ab initio* on the original charges (charges I and II) and the new charges (charges III, IV and V). By *order of the JIRB* dated October 31, 1988 and signed and *executed by the Executive Director/Board Counsel-prosecutor, Robert L. Keuch, Esquire,* all of petitioner's applications and requests set forth in petitioner's said Supplemental Omnibus Application (filed October 20, 1988), including his request for dismissal of charges I and II on the grounds of double jeopardy, were denied. A copy of said JIRB order is reprinted in the Appendix at p.287. Mr. Keuch participated in the investigation, interviewed witnesses, served as advisor to the JIRB, served as prosecuting attorney on behalf of the JIRB, and made adjudicative decisions for the JIRB. From time to time, Mr. Keuch removed his "prosecutor hat" and put on his "judicial hat" and performed judicial functions, e.g., the signing of the aforementioned order of October 31, 1988, denying the petitioner's motion, see Appendix at p.283; the signing of the order of June 29, 1988 denying petitioner's application for disqualification of all members of the JIRB (reprinted in the Appendix at p.213); the signing of the order of July 5, 1988 granting petitioner's motion for a continuance (reprinted in Appendix at p.214), or he donned his "administrative hat" e.g., his review and discussion of the initiation of new charges against the petitioner with all of the members of the JIRB and the hearing committee; the issuance of Notice of Hearing on behalf of the JIRB (Notice of Hearing to be held on November 14, 1988 is reprinted in the Appendix at p.215).

On November 3, 1988, the petitioner filed a Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief in the Pennsylvania Supreme Court. In that second application the petitioner again requested, inter alia, that the original charges I and II be

dismissed on double jeopardy grounds. A copy the "Second Applications" is reprinted (exhibits omitted) in the Appendix at p.216.

On or about November 23, 1988, the petitioner filed Amendments to the Second Application for Writ of Prohibition and/or the Second Application for Extraordinary Relief in the Pennsylvania Supreme Court. A copy of petitioner's Amendments to the Second Application is reprinted (exhibits omitted) in the Appendix at p.260. By Per Curiam order of December 21, 1988, the Pennsylvania Supreme Court summarily denied petitioner's second application for writ of prohibition and/or second application for extraordinary relief, as amended. A copy of said order is reprinted in the Appendix at p.277. Petitioner's timely application for reconsideration was summarily denied by Per Curiam Order dated January 6, 1989.

On March 15, 1989, the consolidated hearing commenced ab initio before a further enlarged hearing committee which now had nine sitting members—seven who were members of the JIRB and two who were former members of the JIRB. Following the close of the hearings oral arguments were heard by the JIRB on July 25, 1989.

In the midst of deliberations by the expanded hearing committee, the JIRB (which included the hearing committee members), through its prosecutor, Robert L. Keuch, notified the petitioner by letter dated January 26, 1990, that the JIRB, with all members participating, had initiated an additional investigation into his conduct involving a sixth and seventh inquiry. On February 20, 1990, the petitioner filed a verified initial response with the JIRB which, *inter alia*, contained averments of commingling of functions, which response was also filed and made a part of the within case. On March 12, 1990, the petitioner filed a sworn supplemental response with the JIRB which, *inter alia*, included: additional averments of commingling of functions. The said supplemental response was also filed in and made a part of the within case.

Eventually, after the petitioner had filed a specific answer of denial to the sixth and seventh inquiries, the said investigation was ended. Additional damage nonetheless was done. Prosecutor Robert L. Keuch, Esquire, had provided

all of the JIRB members, which included the hearing committee members with the information concerning the said investigation of allegations of inappropriate conduct. The JIRB members and hearing committee members received that information and acted upon it. Thus, the JIRB was now further contaminated by the knowledge that the petitioner was the subject of another investigation, even though it eventually proved to be totally unfounded.

On July 17, 1991, a purported Report of the JIRB to the Pennsylvania Supreme Court, Part I, joined by Chairman Bruce W. Kauffman, James H. Higgins, Lawrence T. Hoyle, Jr., Esquire and Antonia L. Scarlata was filed. Those who joined in Part I exonerated the petitioner on charges II, III, IV and V, but concluded that the alleged conduct of the petitioner as to charge I (one of the double jeopardy charges) violated Canon 2 because he failed to avoid the appearance of impropriety as to charge I. A copy of that Report, Part I is reprinted in the Appendix at p.74. On that same day, a *purported* Report of the JIRB to the Pennsylvania Supreme Court, Part II, joined by Judge Frank J. Montemuro, Judge Jessamine S. Jiuliante, Judge John T.J. Kelly, Jr. and Judge Joseph M. James was filed. Those who joined in Part II likewise exonerated the petitioner on charges II, III, IV and V, but concluded that the petitioner had violated Canon 2 by providing a "prohibited *ex parte* 'tip' concerning the Estate of Francis case to Judge Ross," and that the alleged conduct warranted discipline "despite the absence of an improper motive," because the alleged conduct raised an appearance of impropriety as to charge I (the double jeopardy charge). A copy of that report, Part II is reprinted with the Per Curiam Order of October 14, 1992 in the Appendix p.7. Neither Part I nor Part II of the Report of the JIRB addressed the due process and equal protection violations and deprivations cited by the petitioner which had been expressly deferred to the Pennsylvania Supreme Court. Judge James M. Munley authored and filed a Dissenting and Joining Report in which he found no basis for any violation on the part of the petitioner and stated that he would dismiss the proceedings against the petitioner and exonerate petitioner on all charges. A copy of Judge Munley's Dissenting and Joining Report is reprinted in the Appendix at p.104.

On or about December 18, 1991, the petitioner filed in the Pennsylvania Supreme Court a Petition pursuant to Rule 17 of the Rules of Procedure Governing the Judicial Inquiry and Review Board.[4] In that Rule 17 Petition, the petitioner argued, *inter alia,* that he had been deprived of a fair and impartial hearing in direct contravention of the U.S. Constitution by the impermissible commingling of the investigatory, charging, prosecutorial, fact-finding, adjudicative and judicial functions in the same members of the JIRB. Additionally, the petitioner argued, *inter alia,* that his federal constitutional right to not be twice placed in jeopardy was violated when the hearing on the two original charges was abruptly aborted by the orders of the JIRB of October 11, 1988 and October 24, 1988, and he was made to re-defend against those same two charges in a new consolidated hearing with three other charges. The petitioner also argued that he was denied due process when the three new charges were added while he was defending the initial charges.

After briefing, this matter was argued on May 9, 1992 before four members of the Pennsylvania Supreme Court: Justices McDermott, Zappala, Papadakos and Cappy. Chief Justice Nix and Justice Flaherty recused themselves on the day of the argument. On June 18, 1992, while the case was being considered, Justice McDermott died thus leaving a three-member Supreme Court to consider petitioner's case. On October 14, 1992, in a Per Curiam Order, two Justices of the Pennsylvania Supreme Court adopted the Report of the JIRB, Part II and the recommendation contained therein that the petitioner receive a public reprimand, based upon the finding that, notwithstanding the *lack of improper motive*, the petitioner engaged in an *ex parte* communication prohibited by Canon 2 of the Code of Judical Conduct by

4 RULE 17. REVIEW OF BOARD PROCEEDINGS

(a) A Petition to the Supreme Court to modify or reject the recommendations of the Board may be filed within thirty (30) days after the filing with the Prothonotary of the Supreme Court of a certified copy of the recommendation complained of. The petition shall be verified, shall be based on the record, and shall specify the grounds relied on.

providing information to a Common Pleas Court Judge (Judge Ross) relating to a matter that was pending before her and thus created an appearance of impropriety—the double jeopardy charge. A copy of the said Per Curiam order with Appendix is reprinted in the Appendix at p.7. The two Justices, in entering the Per Curiam Order, failed to conduct the required *de novo* review and failed to address the due process and equal protection violations of the U. S. Constitution relating to the commingling of functions, double jeopardy, and the adding of three new unrelated charges in the midst of an ongoing quasi-criminal hearing. Thus, while the two Justices adopted the Report of the JIRB, Part II, in the Per Curiam Order, of October 14, 1992 they failed to address the constitutional due process and equal protection issues raised by the petitioner. Those critical issues had been specifically left to the Pennsylvania Supreme Court for review and resolution by the very Report which the two Justices adopted in their said Per Curiam Order. Justice Papadakos filed a dissenting statement wherein he noted that the constitutional infirmities committed by the JIRB can only be "exonerated" by remanding for new hearings on the one charge submitted to the court. A copy of the said dissenting statement is reprinted in the Appendix at p.4.

On or about November 25, 1992, the petitioner filed an Application for Reargument seeking to have the court reconsider the Per Curiam Order of October 14, 1992, and to have the court address the various constitutional due process and equal protection violations raised throughout the proceedings by the petitioner. In another Per Curiam Order of the two Justices dated January 22, 1993, the Application for Reargument was denied without addressing the said due process and equal protection violations raised by the petitioner. Justice Papakakos dissented. A copy of the said Per Curiam order is reprinted in the Appendix at p.1. As a result, the petitioner was subjected to a public reprimand. A copy of the Reprimand is reprinted in the Appendix at p.72.

Thus, the petitioner has not had any "day in court" on the various constitutional due process and equal protection violations he has raised and re-raised since the outset of these proceedings. The JIRB refused to consider these issues, specificially leaving consideration and resolution of

same to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court in turn, refused, without comment, to address these important constitutional issues leaving the petitioner to seek redress in this Honorable Court. Without this redress, the petitioner will have suffered two injustices: the first of these injustices arises because the petitioner is completely innocent of the charge; and the second arises because of the constitutionally defective procedures, hearings, reviews, appeals, etc. which were used to reach the unjust result. Further, society will have suffered an injustice in that the integrity of the judiciary will have been further eroded.

REASONS FOR GRANTING THE WRIT

The Per Curiam Order of two Justices of the Pennsylvania Supreme Court which ordered a reprimand of the petitioner should be reviewed by the United States Supreme Court because that order was entered in direct violation of the petitioner's fundamental rights under the Fourteenth Amendment of the United States Constitution. The petitioner's rights to due process and equal protection of the law guaranteed by the United States Constitution have been abused and violated at every stage of the proceedings against him. From the outset, the proceedings commenced in a constitutionally impaired manner when, in September, 1987, JIRB member and Common Court Pleas Judge Eunice L. Ross made a belated complaint against the petitioner which pertained to a visit the petitioner made to her on May 30, 1986. The complaint was made to the JIRB, the body of which she was a member, by a communication to Robert L. Keuch, Esquire, the Executive Director and Board Counsel. Previously, Judge Ross had voted with her fellow JIRB members, to initiate an investigation of the petitioner based upon newspaper stories that appeared in Pittsburgh and Greensburg newspapers in April, 1987. Those newspaper stories related to a real estate purchase made by the petitioner which Judge Ross said she then associated with the petitioner's May 30, 1986 visit to her. Judge Ross, thus, had participated in an investigation of the facts which,

in her view, directly related to her complaint against the petitioner. After making a complaint and being involved in the investigation of the petitioner, Judge Ross assumed the role of principal prosecuting witness at the hearings before her fellow JIRB members on the charges which she instigated by her complaint.

The impermissible commingling of functions which punctuated the initiation of charges against the petitioner continued in an extremely virulent form throughout the entire proceedings. The Executive Director and Board Counsel of the JIRB, Robert L. Keuch, Esquire, not only served as the lead prosecuting attorney in the petitioner's hearings, but Mr. Keuch was also involved in the investigation and, in addition, discharged adjudicative and administrative functions directly related to the petitioner and the proceedings against the petitioner. Additionally, the JIRB members as a body, voted in and participated in: the investigation of the petitioner, the charging of the petitioner, the trial of the petitioner, and the adjudication of the charges against the petitioner. This blatant commingling of functions which prejudiced the petitioner and deprived him a fair hearing in this case, has been condemned as violative of traditional notions of constitutional due process and equal protection.

The independence of the judiciary and confidence in the judicial system is threatened when a jurist on the highest court in the Commonwealth of Pennsylvania is systematically deprived of the fundamental rights of due process and equal protection of the law guaranteed to **all** citizens by the Fourteenth Amendment of the United States Constitution. The constitutional assurances of due process and equal protection are perceived as empty promises when these cherished rights are denied to a Justice of the Pennsylvania Supreme Court. The perception that will prevail is: if a man who is at the pinnacle of the judiciary in the Commonwealth of Pennsylvania can be denied his constitutional rights without redress, then who among us can be assured that his or her constitutional rights will be respected and protected?

Additionally, this Honorable Court should grant a Writ of Certiorari in this case in order to review the proceedings which resulted in the overt violation of petitioner's right to

not be twice placed in jeopardy. The proceedings against the petitioner in this matter are "quasi-criminal" in nature, and as such, the petitioner is entitled to all of the fundamental constitutional rights that are available to accused criminal defendants. The JIRB and its Executive Director/Board Counsel prosecutor, Robert L. Keuch, Esquire, observing that the evidence and testimony provided by the primary witness, Judge Ross, lacked credibility and was woefully inadequate to meet the standard of "clear and convincing" evidence of the charges, unilaterally aborted the hearings, added three new unrelated charges to the original two charges, and required the petitioner to defend himself for a second time on the original charges while defending himself on the three new charges in a consolidated hearing *ab initio*. No manifest necessity existed to justify the aborting of the petitioner's original hearing on the original two charges, thus petitioner cannot constitutionally be retried on the original two charges. The petitioner was, nevertheless, retired and was required to defend himself for a second time on the original two charges in direct contravention of that constitutional prohibition.

Finally, this Honorable Court should grant a Writ of Certiorari in this case to review the JIRB's action in adding three new unrelated charges to the original two charges during the course of the hearing on the two original charges, Such overreaching on the part of the prosecution is violative of petitioner's due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution in two ways. First, the adding of the three new unrelated charges while the petitioner was in the midst of presenting his defense on the original two charges failed to provide him with fair notice of the new charges. Second, the adding of the three new unrelated charges, as described, prejudiced the petitioner on the original two charges because the hearing, on the original two charges, was now irreversibly contaminated by the introduction of extraneous unrelated charges while the petitioner was successfully defending the original two charges.

1. THE COMMINGLING OF THE INVESTIGATIVE, PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS IN THE QUASI-CRIMINAL PROCEEDINGS BEFORE THE PENNSYLVANIA JUDICIAL INQUIRY AND REVIEW BOARD VIOLATED THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES CONSTITUTION AND THUS DEPRIVED THE PETITIONER, JUSTICE ROLF LARSEN, OF A FAIR AND IMPARTIAL HEARING

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison* , 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1954). This fundamental principle applies to administrative proceedings which have the power to make adjudications. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct 1689, 36 L.Ed 2d 488 (1973); "[No] man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* 75 S.Ct. at 625. The decision to make an accusation by way of a complaint against another is a decision which necessarily involves a determination that there is good cause to believe that the one against whom the complaint is made is guilty of some wrongdoing, otherwise no accusatory complaint would be filed. Thus, when Judge Eunice L. Ross made the decision to lodge a complaint with the JIRB against the petitioner, she had already determined that the petitioner had engaged in some wrongful conduct. Such a predetermination of misconduct could not be forgotten by Judge Ross when she stepped out of her role as complainant and assumed her role as a JIRB member and, along with her fellow members, participated in a review of the underlying facts of the complaint she made against the petitioner. It is serious constitutional error to permit a procedure where the person who makes the accusation of misconduct participates in the investigation of that accused party where the alleged conduct is connected to the complaint, whether the investigation precedes or follows the complaint. "When constitutional error calls into question the objectivity of those charged with

bringing [an accused] to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery*, 474 U.S. 254, 264, 106 S.Ct 671, 623, 88 L.Ed 2d 598, (1986). The harm to the petitioner was magnified even more when Judge Ross moved from her role as JIRB member, who participated in the review of the accusations she had made, to the role of principal prosecution witness before the hearing committee of the JIRB whose members were the very people Judge Ross deliberated with on this and other matters before the JIRB.

The JIRB impermissibly commingled the investigative, prosecutorial, charging, adjudicative, advice-giving, fact-finding and judicial functions in the proceedings against the petitioner in direct contravention of petitoner's federal conteed by the Fourteenth Amendment. The JIRB installed Robert L. Keuch, Esquire in the dual positions of Executive Director and General Counsel, and further, impermissibly bestowed upon the said Executive Director and General Counsel the commingled powers of *investigator, prosecutor, advisor to the Board, legal counsel to the Board, administrator of the directions and orders of the Board, enforcer of the directions and orders of the Board, and Judge who makes and executes orders,* all of which said Executive Director/Board Counsel unlawfully exercised throughout the proceedings against the petitioner in direct violation of the Fourteenth Amendment of the U. S. Constitution. The various functions of the JIRB are so commingled as to oblige the same people to serve as investigators, initiators of formal charges, prosecutors, and adjudicators. This not only undermines fairness, it destroys any confidence that the petitioner could and would receive a fair hearing. The decisions of the JIRB affecting the substantial rights of the petitioner, including rulings on various motions made pre-hearing, throughout the hearing and post hearing lie under the suspicion of being mere rationalizations of the preliminary findings which the JIRB presented to itself. How could the JIRB exonerate the petitioner after having itself invested over six years of its time, money and considerable resources in attempting to convict the petitioner?

Additionally, throughout the proceedings against the petitioner, Executive Director/Board Counsel-prosecutor Robert

L. Keuch, Esquire was in continuous *ex parte* contact with all members of the original hearing committee, all members of the expanded hearing committee and all members of the JIRB. In the proceedings against the petitioner, it was the JIRB which procured and interviewed the witnesses, which made the decision to institute proceedings alleging misconduct against the petitioner, and which was charged with the responsibility and power to hear, observe and determine the credibility of all witnesses it had procured and interviewed (one of those witnesses was Judge Ross, a fellow member of the JIRB), and to resolve all issues of credibility (including the credibility of Judge Ross), along with making a determination of guilt or innocence. Even though Judge Ross recused herself from participating as a JIRB member in the actual hearings in petitioner's case, Judge Ross continued to function as a JIRB member and hearing committee member in all other matters coming before the JIRB . . . all the while her credibility was being determined by her fellow JIRB members. Thus, simultaneously while Judge Ross was a witness in petitioner's case, she was also hearing cases, making recommendations and voting in all other cases before the JIRB. The aforementioned impermissible commingling of functions referred to above has resulted in the petitioner being deprived of due process and equal protection of law guaranteed him by the Fourteenth Amendment of the U.S. Constitution.

The taint, unfairness, lack of justice, and lack of due process of law interwoven with the impermissibly commingled investigative, charging, prosecutorial, adjudicative, fact-finding and judicial functions all carried out by the JIRB and its Executive Director/Board Counsel-prosecutor was further supported by the former chairman of that JIRB, Judge Edmund B. Spaeth, Jr., in his letter of resignation from the Board dated March 3, 1990, in which he cited the unfairness of the JIRB's procedures because of the commingling of functions as the chief reason for his resignation. See Appendix at p.278.

The JIRB admits that the JIRB itself, and through its staff, exercised investigative, prosecutorial and adjudicative functions throughout the proceedings against the petitioner. The JIRB contends however that the exercise of these

commingled functions is not violative of petitioner's constitutional rights to due process, equal protection and a fair hearing before a fair and impartial tribunal. In support of its position, the JIRB cites *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1973). In *Withrow*, the Court said it is not violative of due process for the members of an administrative agency to investigate the facts, institute proceedings, and then make the necessary adjudications. *Id.*, 421 U.S. at 53. The petitioner's case, however, involves more than merely the JIRB investigating the facts, instituting the proceedings and making the adjudications. In *Withrow*, the Court also observed: [W]e should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice. . . . The mere exposure to evidence presented in nonadversary investigating procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. *Id.* 421 U.S. 54-55.

In the petitioner's case, the complaint was made by a JIRB member, and that JIRB member participated in the nonadversarial investigation of that complaint against the petitioner. Furthermore, the lead prosecuting attorney was in continual *ex parte* communication with all members of the hearing committee and the JIRB during the course of the hearings, and he discharged adjudicatory functions. Thus, in the petitioner's case, there is a specific foundation for suspecting that the JIRB was prejudiced and would be disabled from fairly hearing and fairly deciding the charges against the petitioner on the basis of the evidence presented. See *Withrow v. Larkin*, supra.

Additionally, in the arguments before the Pennsylvania Supreme Court, the JIRB argued that the petitioner's federal constitutional rights were not violated by the commingling of functions in the JIRB and the office of Executive Director/Board Counsel-prosecutor because the JIRB's authority is limited to making a recommendation to the Pennsylvania Supreme Court which recommendation has no binding effect. The theory is that since the JIRB's recommendation of discipline is not final and it is the Pennsylvania Supreme Court which makes the final determination as

to whether discipline is warranted, the commingling of functions within the JIRB is permissible. The Board argues that, in the end, the Court's review will serve to overcome any violation of petitioner's constitutional rights suffered at the hands of the JIRB. That theory and argument fail to acknowledge that the JIRB had and has substantial powers to render final and binding decisions in critical and important areas including the decisive and final power to exonerate the petitioner. When the JIRB decides to exonerate an accused jurist such as the petitioner in this case, it is a final and non-reviewable adjudication. [5] Contrary to the JIRB's assertion that the JIRB cannot issue final adjudications, the decision to exonerate is a final adjudication and, in such case, the Pennsylvania Supreme Court has no authority to review or even see the record of the exoneration. [6] The petitioner has the constitutional and fundamental right to have the opportunity to an unreviewable adjudication of exoneration (not guilty) decided by a fair and impartial Board, untainted by bias and prejudice, and uncorrupted by the commingling of the investigative, charging, prosecutorial and adjudicative functions to the extent that such commingling occurred in this case.

Additionally, in the history of the JIRB and JIRB proceedings, where the JIRB has determined that good cause for a recommendation exists and has made a recommendation to the Pennsylvania Supreme Court, the said Supreme Court has *never rejected or reversed* the JIRB's determination on an issue involving the *credibility* of a witness or witnesses. Thus, for all practical intents and purposes, the JIRB is the final arbiter of the credibility of witnesses. In essence and effect, the JIRB, in these proceedings, acted as the final arbiter of the credibility of Judge Eunice Ross, one of its own members, thus depriving the petitioner of his right to a neutral and detached judge and a fair, unbiased and impartial hearing.

5 First Amendment Coalition v. JIRB, 501 Pa. 129, 460 A.2d 722 (1983).

6 *Id.*

Every man is "entitled to a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 34 L.Ed2d 267 (1972). A State's trial procedure may not be deemed constitutionally acceptable "simply because the State eventually offers a [litigant] an impartial adjudication." *Id.* 489 U.S. at p. 61. Thus, the Board's impermissible commingling of the investigative, prosecutorial, charging, adjudicative, fact-finding and judicial functions cannot be deemed to be harmless because, when a recommendation of sanctions is made by the JIRB, the petitioner is entitled to a de novo review in the Supreme Court. The provision for a *de novo* review cannot cure the prior violations and deprivations of petitioner's rights in that the petitioner is constitutionally entitled to a neutral and detached tribunal in the *first instance* and not just somewhere along the way. *Id.* The fact that an impartial adjudication is eventually offered to the petitioner does not render acceptable, a constitutionally defective procedure before the JIRB. *Id.*

It must be emphasized that the Pennsylvania Supreme Court did not make the required *de novo* review in this case; the two Justices (in a 2-1 vote) simply adopted the Report of the JIRB, Part II, and the recommendation contained therein. Since 1968, the Pennsylvania Constitution has mandated that the Pennsylvania Supreme Court conduct a *de novo* review of any recommendation made by the JIRB. In every other case which has come before the court on a recommendation by the JIRB, a detailed *de novo* review was conducted by the court and specifically set forth in an opinion. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Sylvester*, 521 Pa. 300, 555 A.2d 1202 (1989); *Matter of Braig*, 520 Pa. 409, 554 A.2d 493 (1989). The Per Curiam Order of the two Justices adjuducates the petitioner's case in a summary fashion, without the two Justices conducting a *de novo* review contrary to the mandate of the Pennsylvania Constitution and in violation of the due process and equal protection guarantees of the United States Constitution.

concerned allegations of wholly unrelated and completely separate conduct of petitioner, alleged to have been carried out by the petitioner some two to four years prior to the time frame of the original charges and allegedly involving separate and distinct parties, dates, times, proceedings and subject matter.

As noted *supra*, proceedings before the JIRB are quasi-criminal proceedings. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Dandridge*, 462 Pa. 67, 337 A.2d 885, (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, (1979). The quasi-criminal nature of the proceedings against the petitioner in this case raises the plethora of all the protections afforded to every person charged with a criminal offense. *Matter of Chiovero*, *supra*; *Judicial Inquiry and Review Board v. Synder*, 514 Pa. 142, 523 A.2d 294, 300-01 (1987) (concurring and dissenting opinion, McDermott, J.) ("The removal of a duly elected judicial officer is a matter of the gravest possible concern. The exercise of such power must be rounded at the very least, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.") Additionally, the Pennsylvania Supreme Court has held that the rules of procedure which govern the JIRB must "be meticulously observed." *Matter of Chiovero*, 570 A.2d at 61.

The procedure used by the JIRB in adding three new unrelated charges against the petitioner undoubtedly violated the rules 2 and 8 of procedure governing the JIRB.

Such joinders are also prohibited in civil and criminal proceedings because of prejudice. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *See* Pa. R. Civ. P. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) *Lohmiller v. Widenbaugh, 302 Pa .Super. 174, 448 A.2d 583 (1982), rev'd on other grounds*, 503 Pa. 329, 469 A.2d 578 (1983). See Rule 229 Pa. R. Crim. Pro.

More importantly, the United States Supreme Court has declared that an accused in a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the accused are *added* during disciplinary proceedings based on evidence adduced at said proceedings. *In Re*

2. UNDER THE PROVISIONS OF THE UNITED STATES CONSTITUTION THE PETITIONER JUSTICE ROLF LARSEN'S CONSTITUTIONAL RIGHT NOT TO BE TWICE PLACED IN JEOPARDY AND SUBJECT TO MULTIPLE PROSECUTIONS ON THE SAME QUASI-CRIMINAL CHARGES WAS VIOLATED WHEN THE PENNSYLVANIA JUDICIAL INQUIRY AND REVIEW BOARD UNILATERALLY TERMINATED THE ORIGINAL HEARING DURING THE DEFENSE STAGE THEREOF AND REQUIRED THE PETITIONER TO RE-DEFEND THE ORIGINAL CHARGES AB INITIO IN A CONSOLIDATED HEARING WITH NEW AND UNRELATED QUASI-CRIMINAL CHARGES BEFORE A HEARING TRIBUNAL TO WHICH ADDITIONAL MEMBERS WERE ADDED

From the commencement of the proceedings against the petitioner, the petitioner was required to expend considerable time, energy and personal and financial resources to defend himself against the two original specific charges leveled in the notice of formal proceedings of May 24, 1988, which charges resulted from an investigation that had commenced in or about May, 1987. The evidentiary hearings on the original charges commenced on August 22, 1988, and after 13 days of hearings, 13 witnesses for the Board, 16 witnesses for the petitioner, 45 exhibits for the Board, 41 exhibits for the petitioner, 1704 pages of testimony and stipulated testimony furnished in writing on behalf of the petitioner by 18 additional character witnesses, the JIRB, on October 4, 1988, unilaterally and arbitrarily suspended the hearings by an order dated October 11, 1988. That said order of the JIRB of October 11, 1988, further stated: "In the event the JIRB concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members."

On October 24, 1988, the JIRB, terminated the original hearings by ordering a consolidated hearing *ab initio* on the original two charges and three new unrelated charges which the Board had filed on October 3, 1988. The orders of the

JIRB of October 11, 1988 and October 24, 1988 (along with an order of October 31, 1988 which denied petitioner's challenge to the Board's action), *sua sponte* aborted the hearings on the two original charges (in effect, declared a "mistrial") without cause of necessitous and compelling nature, and unconstitutionally compelled the petitioner to stand trial anew (a second time) on the original charges despite the enormous amount of time and energy and the enormous personal and financial resources the petitioner had been forced to expend up to that time in order to defend against the original charges. The record demonstrates that from the commencement of the hearings up to October 3, 1988, the respondent was prevailing on the merits of the original charges, and that the extraordinary, unprecedented, illegal and unheard of procedure directed by the six member panel of the Board on October 11, 1988 and by Executive Director/Board Counsel-prosecutor Robert L. Keuch on October 24, 1988 was to short-circuit those proceedings, and further was designed to attempt to ensure the participation of Chairman Bruce W. Kauffman in the proceedings against the petitioner so that he, Chairman Kauffman, could continue to orchestrate the proceedings to the petitioner's disadvantage and cast his vote to find the petitioner guilty of misconduct all in violation of the petitioner's federal constitutional right, guaranteed him by the Fourteenth Amendment, not to be twice placed in jeopardy of prosecution (and punishment) for the same alleged offense or misconduct. (See Affidavit of Richard A. Sprague, Esquire reprinted in Appendix at p.283).

Proceedings before the JIRB are quasi-criminal in nature. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979); Matter of Dandridge*, 462 Pa. 67, 337 A.2d 885 (1975). In such quasi-criminal proceedings, the petitioner is clothed with all of the fundamental rights, privileges and immunities of a criminal accused. *Matter of Chiovero, supra*. One of those fundamental constitutional rights is the right to not be twice placed in jeopardy.

The Fifth Amendment to the United States Constitution provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The "double jeopardy" provision of the federal constitution is binding upon the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056. 23 L.Ed 2d 707 (1969). Thus, the petitioner's right to not be twice placed in jeopardy is guaranteed by the Federal Constitution as interpreted in *Benton v. Maryland, supra*.

The U.S. Supreme Court has held that a trial court may abort a trial, and the double jeopardy guarantees will not prevent a retrial, where, after considering all of the facts and circumstances, the court finds "there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579 (9 Wheat 579), 6 L.Ed. 165 (1824). In the instant case, no manifest necessity existed for aborting the hearing, and the ends of justice were defeated by terminating the hearings and starting over again.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.

> (citation omitted). This prevents a prosecutor from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 LEd. 2d 199 (1957). An accused individual, such as the petitioner in this case, has a "valued right to have his trial completed by a particular tribunal." *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed 2d 416 (1982). That valued right was blatantly violated by the aborting of the original hearing and the hearing ab initio ordered retried by the JIRB to be heard by a different tribunal — a different hearing committee. The Per Curiam Order of October 14, 1992 of two Justices of the Pennsylvania Supreme Court which ordered a reprimand of the petitioner was for Charge I, one of the aforesaid objected to double jeopardy charges.

3. THE JUDICIAL INQUIRY AND REVIEW BOARD'S ACTION IN ADDING THREE NEW, UNRELATED CHARGES (NOS. III, IV AND V) TO THE TWO ORIGINAL CHARGES DURING THE HEARING ON THE ORIGINAL CHARGES DEPRIVED THE PETITIONER OF HIS FUNDAMENTAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE UNITED STATES CONSTITUTION

Rule 8 of the Rules of Procedure Governing the JIRB provides:

> The Board at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

Rule 2 of the Rules of Procedure Governing the JIRB provides:

> (a) After the investigation has been completed, if the Board concludes that formal proceedings should be instituted, the Board shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. Such proceedings should be entitled:
> "Before the Judicial Inquiry and Review Board, Docket No. . . . . ."
>
> (b) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within twenty (20) days after service upon him.
>
> (c) The notice shall be served upon the judge by mailing, by prepaid registered or certified mail, a copy of the notice addressed to the judge at his chambers, or if not delivered, then at his last known residence.

The three new charges which were filed as amendments against the petitioner by the Board on October 3, 1988, were later recognized by the JIRB to be new charges in that the said new charges did not "conform to proof or . . . set forth additional facts" developed at the said proceedings as discussed *supra*. The order entered by six members of the Board on October 11, 1988 specifically stated that the said new charges were not Rule 8 "Amendments" but rather were filed pursuant to Rule 2. The so-called "Amended/Reapproved Charges" III, IV and V filed by the Board concerned allegations of wholly unrelated and completely separate conduct of petitioner, alleged to have been carried out by the petitioner some two to four years prior to the time frame of the original charges and allegedly involving separate and distinct parties, dates, times, proceedings and

subject matter.

As noted *supra*, proceedings before the JIRB are quasi-criminal proceedings. *Matter of Chiovero*, 524 Pa. 181, 570 A.2d 57 (1990); *Matter of Dandridge*, 462 Pa. 67, 337 A.2d 885, (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, (1979). The quasi-criminal nature of the proceedings against the petitioner in this case raises the plethora of all the protections afforded to every person charged with a criminal offense. *Matter of Chiovero*, *supra*; *Judicial Inquiry and Review Board v. Synder*, 514 Pa. 142, 523 A.2d 294, 300-01 (1987) (concurring and dissenting opinion, McDermott, J.) ("The removal of a duly elected judicial officer is a matter of the gravest possible concern. The exercise of such power must be rounded at the very least, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.") Additionally, the Pennsylvania Supreme Court has held that the rules of procedure which govern the JIRB must "be meticulously observed." *Matter of Chiovero*, 570 A.2d at 61.

The procedure used by the JIRB in adding three new unrelated charges against the petitioner undoubtedly violated Rules 2 and 8 of procedure governing the JIRB.

Such joinders are also prohibited in civil and criminal proceedings because of prejudice. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *See* Pa. R. Civ. P. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) *Lohmiller v. Widenbaugh, 302 Pa. Super. 174, 448 A.2d 583 (1982), rev'd on other grounds*, 503 Pa. 329, 469 A.2d 578 (1983). See Rule 229 Pa. R. Crim. P.

More importantly, the United States Supreme Court has declared that an accused in a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the accused are *added* during disciplinary proceedings based on evidence *adduced at said proceedings. In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed 2d 1230 (1968); a fortiori the new charges added* to and during the proceedings against the petitioner in these proceedings, totally extraneous to the proceeding and *not adduced at the original hearings,* deprived the petitioner of fair notice, due

process and equal protection per *Ruffalo*.

In the proceedings against the petitioner the manner in which the original charges would have been met (defense strategy, witnesses, pleadings, investigative resources, etc.) most certainly would have been substantially different had the new charges III, IV and V been filed prior to the commencement of the complicated and lengthy proceedings against him. The "absence of fair notice as to the reach of the [JIRB] procedures and the precise nature of the charges deprived the petitioner of procedural due process." *Id.* From the time petitioner received notice of the investigation in July, 1987 and of the charges on May 24, 1988, and up until the time that the new charges were added on October 3, 1988, the petitioner's defense presentation and strategy was at all times designed and molded to conform to the original charges I and II. The petitioner was highly prejudiced and denied due process and equal protection of law by the actions of the JIRB and the Executive Director/Board Counsel-prosecutor Robert L. Keuch in filing new, unrelated and highly inflammatory charges III, IV and V on October 3, 1988 which "new charges" corrupted and polluted the hearing in contravention of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

It is respectfully submitted that for all of the above reasons, review of this matter is appropriate and necessary. The petitioner's rights to due process and equal protection of the law under the Fourteenth Amendment of the U. S. Constitution were repeatedly violated by: (a) the unlawful commingling of the investigative, administrative, prosecutorial and adjudicative functions in the JIRB; (b) the unlawful retrial of the petitioner on charges I and II in violation of his right under the U. S. Constitution to not be twice placed in jeopardy; and (c) the unlawful deprivation of procedural due process by the JIRB unlawfully adding three new charges against the petitioner while the petitioner was sucessfully defending the original two charges.

Finally, a Writ of Certiorari should be granted because the Pennsylvania Supreme Court, acting by and through two justices (of a seven-justice court) has approved of and participated in the denial of the petitioner's rights of due process and equal protection of the law, and his right to be free from double jeopardy, all of which rights are guaranteed to all persons by the United States Constitution. If members of the judiciary are to be uniquely deprived of these fundamental rights, then only this Honorable Court should proclaim that such deprivation is in accord with the United States Constitution. An affirmative proclamation in this regard by this Honorable Court, will inform society of this unique and heretofore unannounced standard and, more particularly, will alert all men and women who aspire to judicial office that, upon becoming a member of the judiciary, the fundamental rights under the Fourteenth Amendment and Fifth Amendment of the United States Constitution which all jurists are sworn to uphold, are forfeited.

Respectfully Submitted,
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92-1833

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, JUSTICE OF THE
PENNSYLVANIA SUPREME COURT

HONORABLE ROLF LARSEN, PETITIONER

APPENDIX I

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In The

Supreme Court of Pennsylvania

IN THE MATTER OF
THE HONORABLE ROLF LARSEN,
Associate Justice

No. 155
Judicial Inquiry and Review Board Docket

Application for Reargument

ORDER

PER CURIAM

AND NOW, this 22nd day of January, 1993, it appearing that the Application for Reargument presents no compelling reasons why reargument should be granted, it is hereby ORDERED that the Application for Reargument is DENIED.

However, we note one claim in the Application for Reargument that necessitates clarification of the footnote in our Order of October 14, 1992. In that footnote, we wrote, "it is the Report and Recommendation of Judges James, Juliante [sic], Kelly, and Montemuro, *whose participation was not challenged,* that we have accepted, following our independent review of the record."[1] (Emphasis added.) The Respondent asserts that he *did* challenge the participation of Judge (now Justice) Montemuro,

1 There is no basis for the claim in the Application for Reargument that we failed to conduct a de novo review.

and therefore it was necessary to address his argument relating to the makeup of the Board.

Our purpose in drafting the footnote was to avoid the confusion that seemed inevitable were we to restate and refute the Respondent's labyrinthine arguments as to who could and could not properly participate as a member of the Board at the various stages of the proceedings. We acknowledge, however, that in attempting to be concise and avoid confusion, we may have inadvertently caused some confusion.

In his original argument to the Court, the Respondent contended that certain Board members should not have participated at various stages because their terms had expired. This argument in large measure overlapped his arguments that certain Board members should not have participated because they should have recused themselves, and his argument that the entire Board should have been disqualified from participating. Our footnote did not adequately distinguish between these arguments.

The focus of our statement in the footnote was the recusal motions filed by the Respondent challenging the participation of individual members of the Board.[2] As there had been no petition for recusal directed specifically to Judge Montemuro,[3] he was included as one "whose participation was not challenged."

The Respondent did, however, make a claim that Judge Montemuro should not have participated in the Report and Recommendation to the Court on July 17, 1991, since his term had expired on May 19, 1991. This argument we dismissed out of hand, as contrary to the terms of Pa. Const., Art. V,

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2 It is noted that each of these motions was denied by the challenged Board member, and we find no abuse of discretion. See generally, *Reilly by Reilly v. Southeastern Pennsylvania Transportation Authority,* 507 Pa. 204, 489 A.2d 1291 (1985).

3 To be absolutely precise, we recognized that Judge Montemuro was a member of the Board at the time the Respondent petitioned for the recusal of the entire Board. The petition, however, contained no grounds for recusal directed specifically to Judge Montemuro. Rather, the Respondent made the untenable argument that no member of the Board would be able to fairly judge the credibility of fellow Board member Judge Eunice Ross, who had been excluded from participation in this matter when it became apparent that she would be a witness in the proceedings.

Sec. 18(b): "The members shall serve for terms of four years, *provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term." (Emphasis added.)* Since the purpose of the hearing is to determine whether the evidence warrants a recommendation of discipline, it would be illogical to conclude that a member is authorized to participate in hearing evidence beyond the expiration of his term but not authorized to participate in the recommendation. The Respondent's approach offers no advantage to the process while inviting delay and inefficiency. Because we dismissed this argument as well as the argument concerning recusal of the entire Board as specious, we failed to appreciate the manner in which our abbreviated statement might be misunderstood.

Mr. Chief Justice Nix did not participate in the consideration or decision of this case.

Mr. Justice Larsen did not participate in the consideration or decision of this case.

Mr. Justice Flaherty did not participate in the consideration or decision of this case.

Mr. Justice Montemuro did not participate in the consideration or decision of this case.

Mr. Justice Papadakos would remand.

In The

Supreme Court of Pennsylvania
Eastern District

IN THE MATTER OF THE
HONORABLE ROLF LARSEN, ASSOCIATE (SIC) JUSTICE
PENNSYLVANIA SUPREME COURT

No. 155
J.I.R.B. Docket

ARGUED: May 7, 1992

DISSENTING STATEMENT

MR. JUSTICE PAPADAKOS

I most reluctantly dissent from the action taken by my colleagues in adopting the recommendation of the Judicial Inquiry and Review Board. I do not reach the merits, as my colleagues have, and I do not question the correctness of the decision on the merits as may appear in the record filed with us by the Judicial Inquiry and Review Board.

Rather, my deep concern arises from the fact that I believe that the entire proceedings have been tainted with procedural infractions of the rules and the substitution of members of the Board participating in successive hearings.

I believe that it was error for the Board to file with us a record on charges they found to be unsubstantiated and for which the Board made no recommendation. I believe this to be a

violation of the constitutional mandate of confidentiality for all matters in which no recommendation of sanction is made to the Supreme Court.

The record should have been filed with us which included only the charge which the Board found to have been substantiated and for which the recommendation of public censure was made.

My objections to the composition of the Board which concluded the proceedings against Mr. Justice Larsen and my views as to the proper procedures to have been followed have been fully articulated in my Dissenting Opinion entered in *Larsen v. Kaufmann, et al,* 525 Pa. 278, 579 A.2d 1302 (1990), and need not be restated here.

However, in response to my colleagues' assertion that the participation of the challenged members did not change the outcome, I must point out that this conclusion lies in the realm of conjecture. The recommendation presented to us is surely the product of a compromise between four who would have opted for a more severe sanction and four who settled for much less. Had the four who settled for much less not met the serious opposition of the other four, would they have carried the day for complete exoneration? Either the image of the judiciary is being severely damaged or the rights of the Respondent have been trampled upon. Under the present circumstances, we cannot know.

Suffice it to say that, in my view, the adding of new charges to proceedings under way, the participation in new hearings by Board members whose terms had expired, and the refusal of this Court to resolve the constitutional issues raised by Mr. Justice Larsen, all of which were held as interlocutory by a divided court on the premise that we can cure any defect upon the filing of a record and recommendation, call for a remand to a properly constituted Judicial Inquiry and Review Board which has jurisdiction to hear and resolve the charge underlying the recommendation of public censure.

The errors alleged by Mr. Justice Larsen and the violations of constitutional rights which he claims in his various petitions to this Court which were held to be interlocutory by a divided Court remain unresolved. The Board cannot resolve these issues as a trial court may. Its only duty is to make a recommen-

dation to our Court as to a proper sanction that may be imposed. Only this Court can now answer those issues.

I realize that this has been a long and trying experience for all parties involved, including this Court which has been put to the unenvious task of judging one of its own on charges of judicial misconduct. The resolution wrought by my colleagues may bring to a close, once and for all, this sad episode and it may be the wise thing to do. However, I feel that the constitutional infirmities I find to have been committed by the Board can only be exonerated by remanding for new hearings on the charge submitted to us.

I therefore dissent and would order a remand.

In The

Supreme Court of Pennsylvania
Eastern District

IN THE MATTER OF THE
THE HONORABLE ROLF LARSEN,
Associate Justice

J.I.R.B. Docket No. 155

ARGUED: May 7, 1992

ORDER

PER CURIAM

AND NOW, this 14th day of October, 1992, after review of the Record and due consideration of the Briefs and Arguments[1], the Court accepts the Report of the Judicial

1 The Respondent has set out a number of arguments sounding in due process, relating to the participation of certain persons in the proceedings and in the Report to the Court. It is apparent, however, that even if those whose participation was challenged had not participated, the Board would have submitted a Report and Recommendation of discipline as to Charge I. Indeed, it is the Report and Recommendation of Judges James, Juliante, Kelly, and Montemuro, whose participation was not challenged, that we have accepted, following our independent review of the record. Thus, the concern that the challenged members might provide the votes necessary to make a recommendation of discipline that otherwise would not be made, and make public a record that would otherwise be required to be kept confidential, did not materialize. Under the circumstances, we do not address these arguments, as any decision on them would not affect the resolution of the matter before us.

Inquiry and Review Board submitted by Judge Joseph M. James, Judge Jess Juliante, Judge John T.J. Kelly, Jr., and Judge Frank J. Montemuro, a copy of which is attached as Appendix I, and the Recommendation contained therein that the Respondent receive a public reprimand, based upon the finding that, notwithstanding the lack of improper motive, the Respondent engaged in an ex parte communication prohibited by Canon 2 of the Code of Judicial Conduct by providing information to a common pleas court judge relating to a matter that was pending before her. Following entry of this Order, an admonition shall be delivered to the Respondent upon exhaustion of any further appeal, and the same shall be docketed and filed in the public record of this matter.

Mr. Chief Justice Nix did not participate in the consideration or decision of this matter.

Mr. Justice Larsen did not participate in the consideration or decision of this matter.

Mr. Justice Flaherty did not participate in the consideration or decision of this matter.

Mr. Justice McDermott did not participate in the decision of this matter.

Mr. Justice Papadakos files a dissenting statement.

Appendix 1

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, ASSOCIATE JUSTICE,
PENNSYLVANIA SUPREME COURT

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD
No. 140 JIRB Dkt. 1987
(Complaint Dkt. No. 87-156)

REPORT OF THE JIRB
TO THE SUPREME COURT OF PENNSYLVANIA

Report of:
Judge Joseph M. James
Judge Jess Juiliante
Judge John T.J. Kelly, Jr.
Judge Frank J. Montemuro

PART II

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, ASSOCIATE JUSTICE,
PENNSYLVANIA SUPREME COURT

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD
No. 140 JIRB Dkt. 1987
(Complaint Dkt. No. 87-156)

REPORT OF THE JIRB
TO THE SUPREME COURT OF PENNSYLVANIA

The instant matter involves five allegations of misconduct levelled against Justice Rolf Larsen of the Pennsylvania Supreme Court. The relevant procedural history may be accurately summarized as follows.

In September of 1987, Judge Eunice Ross of the Allegheny County Court of Common Pleas made a formal complaint against Justice Larsen. Following preliminary investigation under JIRB Rule 1, notice of formal charges was issued to Justice Larsen setting forth two allegations of misconduct. The first charge asserted violations of Pa.Const. Art V, sec. 17(b), and Canons 1, 2, and 3(A) of the Pa.Code of Judicial Conduct with regard to an allegedly improper *ex parte* communication by Justice Larsen to Judge Eunice Ross relating to a case pending before Judge Ross at the time of the alleged communication. The second charge asserted violations of Pa.Const. Art. V. sec. 17(b), and Canons 1 and 2 of the Pa.Code of Judicial Conduct with regard to his alleged pursuit of an appeal from the grant of variances to a developer for the purpose of coercing an inordinate settlement from the developer, and not with the purpose of enforcing the zoning laws. Justice Larsen has denied both charges.

Proceedings before the JIRB followed with various motions disposed and hearings conducted. On October 3, 1988, Amended Charges were issued alleging three additional charges of misconduct.

The first added charge, Charge III, asserted a violation of Pa.Const, Art V, sec. 17(b) and Canons 1, 2, and 3(A)(4) of the Pa. Code of Judicial Conduct with regard to an alleged improper *ex parte* communication by Justice Larsen to Judge Emil Narick of the Allegheny Court of Common Pleas concerning a case pending before Judge Narick at the time of the alleged communication. Charge IV alleged an identical violation with respect to a separate *ex parte* communication by

Justice Larsen to Judge Narick concerning a different case pending before Judge Narick when the alleged communication occurred. The last added charge, Charge V, alleged violation of Pa.Const. Art V, sec. 17(b) and Canons 1, 2, and 3A(4) by attempting to influence Judge Narick's assignment of then pending cases to particular judges.

On October 11, 1988, by unanimous vote of the six members then sitting, it was further decided that the added charges would be redesignated as having been filed pursuant to JIRB Rule 2, rather than JIRB Rule 8 as originally indicated. All five charges were to be heard *ab initio* by a six member panel. The full Board as then composed had been reduced from nine members to six members as the result of the recusal of Judge James E. Rowley and Judge Ross, and the resignation of Judge Alex Bonavitacola.

Proceedings were commenced, but then were continued until after January 1, 1989. JIRB members former Justice Bruce W. Kaufman and Mr. James H. Higgins continued to participate in this matter following the expiration of their terms, despite Justice Larsen's objection to this procedure. *See* Pa.Const. Art. V, sec. 18(b).

New members, Judge John T.J. Kelly, Jr., Judge Charles L. Durham and Judge Jess S. Jiuliante were later appointed to the JIRB, and added to the panel. Thus, the panel eventually presiding in this matter included a full complement of nine members. New proceedings including motions, discovery, and hearings followed. From March 15, 1989 forward, all proceedings were conducted before a full nine member panel. The final hearing at which new evidence was presented in this matter was conducted on June 10, 1989.

Effective April 11, 1990, Board Member Judge Durham resigned. In April 1990, three Rule 9 Reports were issued by remaining Board members.

A short time thereafter, proceedings were stayed pending disposition of a special petition for an order seeking a permanent injunction barring this Board from proceeding based upon alleged procedural irregularities/recusal grounds. Relief was denied by an evenly divided Court. *Larsen v. Kaufman*, ____ Pa. ____, ____ A.2d ____ (1991)(No. 152 JIRB).

Judge Joseph M. James became a member of the Board

and took Judge Durham's place in these proceedings. All transcripts, exhibits and related documents were provided for Judge James' review and analysis, including all three Rule 9 Reports.

Following removal of the Supreme Court's stay, this Board conducted the required Rule 11 Hearing on May 21, 1991. We now issue our Final Report and Recommendation to the Supreme Court.

The record in this case is voluminous. Twenty-one Board Hearings were conducted at which forty witnesses gave testimony. Twenty-four volumes of transcripts were produced containing three thousand five hundred and fourteen pages of testimony. The Board submitted sixty-four exhibits; Justice Larsen submitted another fifty-seven exhibits. The motions and pleadings are likewise numerous, intricate, and voluminous.

This report will proceed in the following manner. First, we will offer introductory remarks regarding the JIRB's fact-finding and credibility determining functions, along with some guiding principles we applied in evaluating the evidence presented. Second, we will review character evidence offered on Justice Larsen's behalf relevant to all five charges. We will then review the evidence, make findings, and discuss charges one and two separately and in turn. We dispose of charges three, four, and five in one brief section. Finally, we discuss permissible sanctions and our recommendation to the Supreme Court in this case.

I. *JIRB'S ADVISORY FUNCTION*

The Judicial Inquiry and Review Board is a constitutionally created agency, judicial in character, charged with the important function of receiving, investigating, and making disciplinary recommendations to the Supreme Court regarding formal and informal complaints of ethical misconduct by members of the Pennsylvania judiciary. *See* Pa.Const. Art V, sec. 18; 42 Pa.C.S.A. §§3301 *et seq.; see also Matter of Chiovero*, 524 Pa. 181, 184, 570 A.2d 57, 58 (1990)(*per* Papadakos; McDermott and Zappala, JJ., join); *Matter of XYP*, 523 Pa. 411, 416, 567 A.2d 1036, 1038 (1989); *Office of Disciplinary Counsel v. Surrick*, 521 Pa. 264, 267-68, 555 A.2d 883, 885 (1989); *First*

Amendment Coalition v. JIRB, 501 Pa. 129, ____, 460 A.2d 722, 723-24 (1983). Unless and until a majority of the JIRB finds good cause to recommend disciplinary action by the Supreme Court, all proceedings must remain confidential. Pa.Const. Art V, sec. 18(h); 42 Pa.C.S.A. §3334; JIRB Rule 20; *see also Matter of Chiovero, supra*, 570 A.2d at 61; *id.*, 570 A.2d at 67 (Nix, C.J., dissenting, Flaherty, J., joins); *In re Subpoena of JIRB*, 512 Pa. 496, 517 A.2d 949 (1986); *Application of Surrick*, 504 Pa. 25, 470 A.2d 447 (1983); *First Amendment Coalition v. JIRB, supra*.

Any recommendation of disciplinary action made to the Supreme Court must be accompanied by a certified record of all proceedings on those charges before the JIRB, and a report containing findings of fact and conclusions of law regarding those charges in support of the JIRB's recommendation. JIRB Rule 16. It is customary for any concurring or dissenting members of the JIRB to forward with the report of the JIRB majority a similar minority report explaining the grounds for concurrence or dissent. *See Matter of Sylvester, 521* Pa. 300, 303 & n.3, 555 A.2d 1202, 1203 & n. 3 (1989); *Matter of Braig*, 520 Pa. 409, 413 & n.3, 554 A.2d 493, 495 n.3 (1989); *Matter of Cunningham*, 517 Pa. 417, 423 & n.2, 538 A.2d 473, 476 n.2 (1988); *Matter of Dalessandro*, 483 Pa. 431, 436, 397 A.2d 743, 745 (1979)(plurality, *per curiam*, Manderino and Larsen, JJ., join); *Matter of Johnson*, 483 Pa. 227, 230, 395 A.2d 1319, 320 (1978).

A JIRB report, whether a majority or minority report, is *merely advisory* and carries only such weight as our Supreme Court shall find its analysis compels during our Supreme Court's own *de novo* review of any judicial disciplinary matter properly brought before it. *See* Pa.Const. Art. V, sec. (h). In the past, our Supreme Court has exercised its authority to modify as well as to reject outright, findings, conclusions, and disciplinary recommendations. *See Matter of Chiovero, supra; Matter of Sylvester, supra; Matter of Braig, supra; Matter of Cunningham, supra; Matter of Glancy (I)*, 515 Pa. 201, 527 A.2d 997 (1987); *Matter of Dalessandro, supra (per curiam*; Manderino and Larsen, JJ., join); *Matter of Johnson, supra*.

In making findings and drawing conclusions, we keep foremost in mind the burden of proof in disciplinary proceedings.

Before any disciplinary action may be taken by our Supreme Court, they must first find that an ethical violation has been established by clear and convincing evidence. *See Matter of Chiovero, supra,* 570 A.2d at 60; *Matter of Sylvester, supra; Matter of Braig, supra; JIRB v. Snyder*, 514 Pa. 142, 523 A.2d 294 (1987); *see also Matter of Delassandro*, supra, 397 A.2d at 751 ("it *was by no means clear and convincing* that the respondent was intentionally exploiting his judicial position"); *Matter of Johnson*, supra, 395 A.2d at 1325 ("The evidence concerning respondent's manner during the above proceedings was sharply in conflict. . . . The evidence in this regard *is not clear and convincing* and is insufficient to sustain the imposition of an official reprimand."). Our Supreme Court has repeatedly explained that:

> [t]he standard of clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Matter of Chiovero, supra, 570 A.2d at 60; *Matter of Sylvester, supra*, 555 A.2d at 1203-04; *Matter of Braig, supra,* 554 A.2d at 495; *JIRB v. Snyder, supra*, 523 A.2d at 299.

In order for a witness' testimony or other evidence to support a finding of clear and convincing evidence the witness must be credible and the evidence offered must be based upon distinct personal knowledge of the relevant facts, undecayed by time and untainted by the corrupting influences of bias or suggestion. *See generally LaRocca Trust*, 411 Pa. 633, 192 A.2d 409 (1963)(testimony was evasive and evinced both bias and a memory decayed by time); *Carlin v. Pa. Power & Light Co.*, 363 Pa. 405, 70 A.2d 345 (1950)(evidence lacked statements of personal knowledge of critical facts, was neither clear nor precise, and one witness had obvious bias); *Alliquipa Nat'l Bank v. Harvey*, 340 Pa. 223, 16 A.2d 409 (1940)(evidence was contradictory, biased, and hardly credible, inconsistencies between statements and conduct noted); *Matter of Jackson*, 302 Pa.Super. 369, 448 A.2d 1087 (1982) (witnesses lacked personal knowledge of relevant facts).

The effects of conflicts in the evidence or corroboration of particular evidence will vary depending upon the credibility of the individuals involved, the degree of conflict or corroboration, and the importance of the point with respect to which the conflict or corroboration occurs. The existence of a conflict in the evidence with regard to a material fact, by itself, may preclude a finding that a charge has been sustained by clear and convincing evidence. *See e.g. Matter of Johnson, supra*. On the other hand, there is no mechanistic corroboration requirement; rather, a charge could be sustained on the basis of the uncorroborated testimony of a single credible witness *in an appropriate case. Compare In re McDonough*, 296 N.W.2d 648, 692 (Minn. 1980) ("no mechanistic corroboration requirement is necessary . . . in fact, depending on its source, uncorroborated evidence may be more reliable than that remotely corroborated by a dubious source), *and In re Boyd*, 308 So.2d 13, 21 (Fla. 1975) ("evidence to sustain a charge of unprofessional conduct against a member of the bar, where in his testimony . . . he has fully and completely denied the asserted wrongful act, must be clear and convincing, and that degree of evidence does not flow from testimony of one witness, unless such witness is corroborated to some extent by either facts or circumstances").[1]

Likewise, in assessing the evidence, due consideration must be given to any character evidence offered on behalf of the respondent. *See Matter of Sylvester, supra*. The weight to be given character evidence will vary depending upon the circumstances. *Compare Matter of Sylvester, supra; JIRB v. Snyder*, supra, 523 A.2d at 304 (Papadakos, J., concurring and dissenting); *and In re Dandridge*, 462 Pa. 67, 70, 337 A.2d 885, 886 (1975). When there is slender evidence to sustain a charge or when the evidence is ambiguous, character evidence may dispel suspicions of impropriety a jaundiced eye might otherwise perceive; on the other hand, when proofs are credible, multiple, and incontrovertible, character evidence will be of little avail except in mitigation of the penalty. *Compare Matter of Sylvester, supra; JIRB v. Snyder, supra; and In re Dandridge,*

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1 We note that *Boyd* involved allegations of misconduct against a Florida Supreme Court judge regarding *ex parte* communications.

supra.[2]

In assessing the credibility of witnesses and the weight to be accorded their testimony, the need to identify and discount for the deleterious effects of personal *animus* and/or bias is obvious. Less clear, but equally, if not *more* important, is our responsibility to identify and discount for the effects of innocent "fallacies of testimony" which infect and distort the testimony of even the most forthright and well-intended of witnesses.

The venerable trial advocate Francis Wellman cogently observed long ago:

> No one can frequent our courts of justice for any length of time without finding himself aghast at the daily spectacle presented by seemingly honest and intelligent men and women who array themselves upon opposite sides of a case and testify under oath to what appears to be absolutely contradictory.

Wellman, *The Art of Cross-Examination*, at 139-40 (Rev.ed 1904).

We have reached various findings of fact and conclusions of law which implicitly or explicitly reject certain testimony as not credible. In doing so, we emphasize the numerous sources of *innocent* fallacies of testimony. *See generally* Wellman, *supra*, at 139-53. Our rejection of an individual's testimony in whole or in part is not intended to imply perjurious or corrupt motivation. To the contrary, the witnesses in these proceedings appeared generally forthright and sincere despite the various conflicts in their recollections of the relevant events.

We note that we are well aware of the potential for manipu-

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2 In *Shilling v. State Com'n on Judicial Conduct*, 415 N.E. 2d 900, (NY 1980), that court explained with regard to evidence of a judge's good character that:

> character evidence does not exist in a vacuum, and its value, influence, or the weight to be accorded it depends in great part upon the other evidence in the case. . . If the evidence against a [respondent] is cumulative and reliable, the influence of contrary evidence of good character is likely to be slight. Under other circumstances, such evidence may be so good, if believed, as to create a reasonable doubt where without it none would exist.

415 N.E. 2d at 902. We agree.

lation of the JIRB disciplinary process for personal and/or political motives. *Cf. Matter of Chiovero, supra,* 570 A.2d at 61. All proceedings before the JIRB are privileged from liability for defamation, even if allegations are false and made with actual malice. Pa.Const. Art V, sec. 17(h); 42 Pa.C.S.A. §3332(c); JIRB Rule 21. While statements regarding JIRB proceedings or the substance of allegations made outside JIRB proceedings are not covered by that privilege,[3] sanctions for violations of confidentiality and/or liability for defamation are still quite limited. *See First Amendment Coalition v. JIRB*, 784 F.2d 467 (3rd Cir. 1986); *Office of Disciplinary Counsel v. Surrick, supra; Larsen v. Philadelphia Newspapers,* 375 Pa.Super. 66, 543 A.2d 883 (1988); *cf. Matter of Dalessandro*, 483 Pa. 431, 465, 397 A.2d 743, 760 (1979). Consequently, there is a very real risk that JIRB proceedings may be misused and manipulated for political and/or personal motives entirely unrelated to the maintenance of a just and ethical judiciary. *See First Amendment Coalition v. JIRB*, 784 F.2d 467, 475-77 (3rd Cir. 1986)(collecting authorities); *cf. Matter of Chiovero, supra,* 570 A.2d at 67 (Nix, C.J.; dissenting, Flaherty, J., joins).

We recognize too, that it is our solemn responsibility to ensure that the authority of the JIRB is exercised carefully so as to promote the *independence* as well as the *integrity* of our judiciary. *Matter of Chiovero, supra,* 570 A.2d at 67 (Nix, C.J., dissenting, Flaherty, J., joins); *cf. Matter of XYP, supra.* We have kept in mind Justice Hugo Black's ominous warning that unless discipline of the judiciary is carefully controlled, "the hope for an independent judiciary will prove to have been no more than an evanescent dream." *Chandler v. Judicial Council*, 398 U.S. 74, 143, 90 S.Ct. 1648, 1683, 26 L.Ed.2d 100, 141 (1970)(Black, J., dissenting).

The burden of proof in these proceedings is *proof by clear and convincing evidence.* We therefore restrict our conclusions to whether the alleged misconduct was established by *clear and convincing evidence.* In this context, the concepts of proof by probable cause, preponderance, reasonable suspicion or mere suspicion are simply not relevant. We are neither authorized nor inclined to offer any opinion as to the *degree* by which

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3 *Cf. Pelagatti v. Cohen,* 370 Pa.Super. 422, 437-38, 536 A.2d 1337, 1344-45 (1987).

an allegation may have failed of insufficient proof, nor do we offer any opinion as to the ethics of the conduct of the parties beyond that required to determine the specific charges of misconduct presented through proper procedures for review. *Cf. Matter of XYP, supra.* The provisions of the Code of Judicial Conduct, rather than our personal views of propriety, have been our measure in this matter. *Cf. Matter of Chiovero, supra,* 570 A.2d at 60-61.

Finally, we note that though Justice Larsen has raised numerous due process challenges to the manner in which these proceedings were conducted, as well as to the refusal of certain members of the Board to recuse themselves,[4] we offer no opinion on these matters. Our reports to the Supreme Court are solely advisory, we are confident that the Supreme Court will consider Justice Larsen's various allegations in assessing the weight to be given the reports submitted, and take such other actions as it deems appropriate. Cf. *Matter of Chiovero, supra,* 570 A.2d at 61; *Matter of Dalessandro, supra,* 397 A.2d at 760 (per curiam; Manderino and Larsen, JJ. join).

II. CHARACTER EVIDENCE REGARDING JUSTICE LARSEN

Because the character evidence offered on behalf of Justice Larsen is relevant to our analysis of all five charges, we consider it first and separately from the evidence and findings pertaining separately and solely to each charge raised. Our findings in this regard should be considered to be incorporated by this reference into the discussion of each of the separate charges which follow.

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4 With regard to the varied recusal motions we make the following clarification. There are, as yet, no rules promulgated regarding the manner in which motions to recuse JIRB members are to be handled. In absence of clear authority, the Board is doubtful of its authority to pass on such motions as a Board. Consequently, the Board has followed the general rule of leaving recusal motions to the discretion of the Board member against whom the motion is addressed. *Cf. Matter of Chiovero, supra,* 570 A.2d at 60. *Goodheart v. Casey,* 521 Pa. 316, 565 A.2d 757 (1989); *Reilly by Reilly v. SEPTA,* 507 Pa. 204, 489 A.2d 1291 (1985). Orders entered denying such motions have reflected the decision of the individual member whose recusal was sought; the full board has taken no position on the merits of any of the petitions.

1. Upon graduation from Penn Township (now Penn Hills) High School in 1953, Justice Larsen served on active duty in the United States Army until his honorable discharge in 1956. (Larsen, TR at 2506-07).

2. Justice Larsen earned his law degree from Dickinson School of Law and was admitted to practice in Pennsylvania Courts in 1960. (Larsen, TR at 2506-07).

3. Justice Larsen was a sole-practioner for 13 years with a concentration in personal injury and domestic relations matters. (Larsen, TR at 2633).

4. Justice Larsen was elected Judge of the Allegheny County Court of Common Pleas in November 1973. He was formally commissioned and took his oath of office in January 1974. (Larsen, TR at 2507).

5. Justice Larsen was elected Associate Justice of the Pennsylvania Supreme Court in November 1977. He was formally commissioned and took his oath of office in January 1978. (Larsen, TR at 2507).

6. From 1964 to 1980, Justice Larsen received, periodically, highly laudatory coverage by the press; however, from 1980 to the present, coverage in major newspapers such as the *Pittsburgh Post Gazette* and the *Philadelphia Inquirer* has been almost uniformly negative. Justice Larsen's suit for defamation and related claims against those papers remains pending. (EX R-24; *Larsen v. Philadelphia Newspapers*, 375 Pa.Super. 66, 543 A.2d 1181 (1988)).

7. Despite considerable adverse publicity concerning the substance of charges I and II of these proceeding and adverse publicity relating to charges dismissed by the JIRB in previous proceedings, Pennsylvanians voted to retain Justice Larsen for another 10-year term in November 1987. (Larsen, TR at 2507; Ross, TR at 823; Resp. Response to LOI, 10/22/87; EX B-53; EX R-2; Grochot & Gazarik, "Land Sale Scrutinized: FBI Looking Into Zdrale Bankruptcy," *Sunday Tribune Review*, at A-1, A-10 (April 19, 1987).

8. Testimony of twenty-nine distinguished and wholly credible citizens of this Commonwealth including businessmen, doctors, a member of the clergy, County Commissioners, labor officials, Pennsylvania's present Auditor General, the Dean of Duquesne Law School, private attorneys, law enforcement

officers, defense attorneys, District Attorneys, and Pennsylvania's present Attorney General, established Justice Larsen's general reputation and character as an honest, diligent, impartial, caring and intelligent individual and jurist. (Uehlein, TR at 1066-70; Lewis, TR at 1162-73; Cindrich, TR 1174-83; Lightman, TR 1221-30; Zavarella, TR 1319-21; Bascelli, TR 1385-87, McCommons, TR 1387- 90; Hafer, TR at 2481-84; Preate, TR at 2485-2505; Mendelson, TR at 2933; EX R-24; EX R-25).

9. Evidence was presented that Justice Larsen, throughout his life, has demonstrated a genuine concern for the harried, the troubled, and downtrodden by personally intervening in attempts to address and resolve the personal and professional problems of Judge Finkelhor, Judge McFalls, and Judge Ross and through his conduct in befriending and supporting Attorney Ashton in his struggle with alcoholism and battles with cancer after his reinstatement to the bar. (Ashton, TR at 190-04; Zavarella, TR at 1332-34; Larsen, TR at 2670-01, 2681-83, 2541-48, 2518, 2595-97).

10. Further evidence of Justice Larsen's lifetime concern and compassion for his fellow man was presented in the form of an editorial printed by the *Pittsburgh Post Gazette*, on December 23, 1964. After lamenting the unwillingness of members of modern society to come to each other's aid and get involved, the article went on to state:

> In view of this recent history of callous indifference to the suffering of one's fellow man, it was most reassuring to read about the Pittsburgh lawyer, Rolf Larsen, who subjected himself to assault rather than tolerate the annoyance of a defenseless woman.
>
> Mr. Larsen intervened and, for his pains, was beaten by a Baltimore visitor subsequently charged by police with drunkenness and assault and battery.
>
> We commend Mr. Larsen for his chivalry in an age where it has all but ceased to exist. He is his brother's keeper and all of us are enriched by his conscience and his courage.

This evidence was supported by a second editorial in the Fall 1987 edition of *Juris: The Duquesne Law School News Magazine*, which quoted the *Pittsburgh Post Gazette* editorial *verbatim*, and went on to state:

> We thought it would not be too extravagant to draw on the Post Gazette's comments since *it tends to characterize the life and service of Justice Rolf Larsen.* Moreover, since the pretext for electing (or retaining) a judicial candidate cannot be measured exclusively by his or her opinions alone — we don't elect opinions to office — *the foregoing observations aptly capture the essence of this otherwise enigmatic justice.*

(Emphasis added). (EX R-24; EX R-25).

11. Justice Larsen's excellent reputation and high standing in the community both as a caring individual and as a respected jurist was further evidenced by his receipt of numerous honors and awards, including:

> *Outstanding Jurist Award* - Pennsylvania District Attorney's Association, August 7, 1985;
> *Judicial Excellence Award* - Pennsylvania AFL-CIO, December 12, 1986;
> *Justice Michael A. Musmanno Award* - Philadelphia Trial Lawyers Association, July 12, 1986;
> *Allegheny County Citation of Merit*, Allegheny County Board of Commissioners, December 12, 1986;
> *Humanitarian Award*, Careers, Inc., June 16, 1984;
> *Special Tribute*, American Cystic Fibrosis Foundation, (date not specified in the *Juris* article);
> *Man of the Year - 1981*, Catholic War Veterans, January 23, 1982.

(EX R-24).

12. Justice Larsen's character and reputation as an ethical and competent jurist was further supported by evidence of the endorsement of his retention as Associate Justice of our

Supreme Court in 1987, by various highly respected organizations, including:

— Pennsylvania State Democratic Committee
— Pennsylvania Republican State Leadership Committee
— Pennsylvania State Education Association
— Pennsylvania AFL-CIO
— Pennsylvania Mothers Against Drunk Driving
— Pennsylvania Fraternal Order of Police
— Pennsylvania Chiefs of Police Association
— Pennsylvania District Attorney's Association
— Pennsylvania Bar Association

(EX R-24, EX R-25).

13. Justice Larsen's commitment to the improvement of Pennsylvania's justice system, above and beyond his numerous significant opinions for the Supreme Court, was demonstrated by evidence of his initiation of substantial reforms in Allegheny County support payment enforcement, and his development and introduction of innovations such as the One Day/One Trial jury service system, the Client Security Fund, and the Jury Questionnaire for evaluation of trial court judicial performance. (EX R-24).

14. Based upon the foregoing we find that:

> Justice Larsen enjoys an excellent reputation for truthfulness, integrity and ethical conduct as an individual, and as a jurist;
>
> Justice Larsen is respected as a caring and compassionate individual; and finally,
>
> Justice Larsen is further respected as a well-qualified, diligent, and effective jurist dedicated to the maintenance and improvement of Pennsylvania's justice system.

Discussion

Our findings regarding Justice Larsen's character evidence

are a principle point of divergence between this report and the report filed by the Honorable Bruce W. Kauffman, James H. Higgins, Lawrence T. Hoyle, Jr., Esq., and Mrs. Antonia L. Scarlata. The later report briefly notes that character evidence was presented, makes no finding regarding the evidence, and then drops the character evidence issue entirely without ever considering the weight to which Justice Larsen's excellent character was entitled in accessing the numerous ambiguities and conflicts in the evidence presented on each of the charges presented.

The copious evidence of Justice Larsen's excellent character for truthfulness, integrity, compassion and competence was both compelling and entirely uncontradicted. Significantly, the failure to give the character evidence its proper weight in analyzing the evidence is in direct contravention of unanimous, clear, and binding Supreme Court precedent. *Matter of Sylvester, supra (per* Stout, J.; Nix, C.J., and Flaherty, McDermott, Zappala, and Papadakos, JJ., join).

This distinction between our Reports is critical. The weight given to the character evidence permeates the analysis in each Report. While we note this difference in particular instances, *infra*, we imply the distinction with regard to all conflicts and ambiguities in the evidence which relate to Justice Larsen's conduct, or which involved testimony by Justice Larsen.

III. EVIDENCE AND FINDINGS - CHARGE I

The first charge involves an allegation of an attempt by Justice Larsen to influence Judge Ross by an *ex parte* conversation relating to the *Estate of Francis* case, which was pending before Judge Ross at the time of the conversation at issue.

It is suggested that Justice Larsen was attempting to aid Attorney Robert Lampl and his counsel, Attorney James Ashton, in connection with a claim for the return of $17,000 by Attorney Lampl to the Francis Estate. It is further suggested that Justice Larsen was motivated to attempt to influence Judge Ross on Attorney Lampl's behalf as the result of Attorney Ashton's involvement in a real estate transaction in which Justice Larsen and his daughter, Nina Larsen, purchased undeveloped land from Mr. Nikolai Zdrale in Fairfield Township, West-

moreland County.

We shall begin with initial findings regarding the relevant testimony provided, and then conclude with ultimate findings of fact based upon our assessment of the credibility and weight to be assigned to the testimony and evidence submitted.

Our ultimate findings may be summarized as follows:

— there was no need for Justice Larsen to attempt to influence Judge Ross on Attorney Lampl's behalf;
— there was no motive for Justice Larsen to attempt to influence Judge Ross on Attorney Lampl's behalf;
— Justice Larsen did not attempt to influence Judge Ross on Attorney Lampl's behalf; but
— Justice Larsen, without apparent improper motive, improperly provided Judge Ross with a prohibited *ex parte* tip concerning possible bankruptcy fraud in a case over which Judge Ross was then presiding.

A. BACKGROUND REGARDING ESTATE OF FRANCIS

1. Eunice Ross is a commissioned judge of the Allegheny Court of Common Pleas, and has served in that capacity since her initial appointment in 1972. (Ross, TR at 795-96).

2. Attorney Robert Lampl is a sole practioner practicing in the greater Pittsburgh area with a concentration on bankruptcy and debtor/creditor cases. (Lampl, TR at 31-32).

3. Attorney Ashton is an attorney who was readmitted to practice in Pennsylvania and federal courts in 1984 following his substantial rehabilitation and recovery from problems related to alcoholism which led to his original disbarment for felony offenses related to his substance abuse. Attorney Ashton had offices in the same building as Attorney Lampl. They referred cases to each other, and occasionally acted as co-counsel. Attorney Ashton represented Attorney Lampl in the *Estate of Francis* case. (Ashton, TR at 180-01, 230; Lampl, TR at 55).

4. Attorney Lampl represented Mr. Homer Douglas Francis in Bankruptcy Court; but, while bankruptcy proceedings were still pending, Mr. Francis died. (Lampl, TR at 55-56; EX B-5;

EX B-9; EX B-10, EX B-62).

5. The matter of *Estate of Francis* was opened in Allegheny Court of Common Pleas on behalf of the estate of Mr. Francis, and Judge Ross was assigned to preside over the case. (Lampl, TR 57-58).

6. Attorney Jon Botula and Ms. Barbra Vanyo were appointed co-administrators on September 29, 1982. They were subsequently removed as co-administrators by order of court. (EX B-5).

7. In January 1986, the administratrix of the Francis Estate filed a motion to show cause why Attorney Lampl should not be ordered to return approximately $17,500 he had dispersed for Mr. Francis as his attorney in the bankruptcy matter prior to Mr. Francis' death; Judge Ross entered an order directing Attorney Lampl to show cause as requested. (EX B-5).

8. Attorney Ashton represented Attorney Lampl in the proceedings before Judge Ross.

9. On May 30, 1986, Justice Larsen met with Judge Ross and informed her that two informants who wished to remain anonymous had told him that Jon Botula had received the money in the *Estate of Francis* case, and used the money to buy a condominium in Florida.

10. On April 19, 1987, an article was published which suggested that Justice Larsen, Attorney Ashton, and Attorney Lampl had been involved in a questionable land deal in May, 1986. This article came to Judge Ross' attention and caused her to reconsider the nature and import of Justice Larsen's May 30, 1986 tip. When that reconsideration occurred is unclear, though it seems probable that it did not occur until after the JIRB meeting on May 18, 1987, and after a court hearing in the *Estate of Francis* case on July 7, 1987, as Judge Ross' conduct on both occasions indicated an absence of any well-formed suspicion of impropriety concerning the May 30, 1986 tip.

11. On July 7, 1987, Judge Ross indicated at a hearing in the *Estate of Francis* case that she was satisfied with the responses and documentation submitted on Attorney Lampl's behalf and would consider that aspect of the case closed if the attorney for the estate had no objections. The attorney for the estate raised limited objections to the entitlement of a few

recipients of certain checks, and so a final hearing on the matter was scheduled for October 27, 1987. (EX R-5).

12. On October 8, 1987, one month before Justice Larsen's scheduled retention election, an article appeared on the front page of the *Pittsburgh Post Gazette* by Bill Moushey discussing the May 30, 1986 conversation between Justice Larsen and Judge Ross, and the Zdrale land deal. The article suggested that Justice Larsen had specifically attempted to influence Judge Ross on behalf of Attorney Lampl and Attorney Ashton in the *Estate of Francis* case, and that Attorney Ashton and Attorney Lampl had been involved in Justice Larsen's questionable and very favorable land purchase from Mr. Zdrale at about the same time. The article indicated that Justice Larsen was suspected of impropriety and that Judge Ross had reported the matter to the Justice Department and to "at least one official of state government." The source of the disclosures was not revealed in the article. (*See* Moushey, "Larsen asked relief for lawyers," *Pittsburgh Post Gazette* at 1 (October 8, 1987)).

13. Attorney Lampl testified that he was told by Mr. Moushey that his principle source for the article was a member of Judge Ross' staff. (Lampl, TR at 90, 92 & 133). Mr. Moushey declined to confirm or deny Attorney Lampl's assertions. (Moushy, TR at 1145-46, 1657-85).

14. At the hearing before this Board, Judge Ross denied having anything to do with the Moushey article, or knowing how Mr. Moushey received information concerning Justice Larsen's conversation with her or her reports of the matter to state and federal authorities. Judge Ross noted various significant inaccuracies in the article, including the assertion that Justice Larsen had mentioned Attorney Ashton and Attorney Lampl in the May 30, 1986 meeting, which even she denies. She also noted that only $500,000 rather than $2,000,000 dollars (as indicated in the article) was suspected to have been improperly taken from the Francis estate. (Ross, TR at 865-67).

15. Following publication of the Moushey article, Attorney Ashton moved to have Judge Ross recuse herself due to the *ex parte* contacts suggested in the article. In denying the motion, Judge Ross stated:

> The Petition for recusal on its face fails to allege any facts which would indicate that this Court is biased or prejudiced or not impartial toward Mr. Lampl.
>
> The Court has no control over what newspaper writers write about a public record. The opinion expressed in the article was the opinion of the writer of the article. The article indicated that this Court, and properly so, would not comment about that case nor about the allegations concerning Justice Larsen. The court is well aware, under the Canons of Judicial Ethics, the court may not, ever, comment to any newspaper reporter about pending litigation and certainly Homer Douglas Francis litigation. This Court has been careful to preserve the rights of all parties who appeared before it. I am sure that if the court had not been so impartial, we would have concluded these matters a long time ago. Your motion will be denied Mr. Ashton.

(Lampl, TR at 92, 153-54; EX R-3, at 19-20; EX R-5).

16. Judge Ross' February 29, 1988 opinion evinces a profound change for the worse in her disposition toward Attorney Lampl's conduct in the *Estate of Francis* case from that which she had expressed at the July 7, 1987 hearing. Her opinion provides in pertinent part:

> Respondent never disclosed initial fees to the bankruptcy court nor did he seek or obtain approval of subsequent fee payments (two of which were received after decedent's death). He is unable, because his records no longer exist, to testify as to services rendered or time spent or expenses incurred with the specificity and detail required by Rule 2016 of the bankruptcy court. The dismissal of the proceedings on March 30, 1986, by that court does not constitute an approval of the fees nor have the creditors ratified or approved them and certainly the deceased debtor could not.

Respondent failed reasonably to supervise or monitor the debtor's use of estate funds, compounding the hemorrhage of assets from the estate. His actions raise no equity in favor of permitting him to retain any part of the fees paid over to him which were the subject of citation and petition.

Respondent was at least negligent in his failure to ensure that the debtor filed monthly financial statements or a plan of arrangement. He put estate funds at risk by his devious purchase of the Malley estate judgment followed by two questionable sales from which a profit was reaped, part of which came back to the instant estate in addition to the original loan amount. He is fortunate this estate lost nothing. Whether the Malley estate suffered is not for this Court to decide. Respondent's loose supervision made it possible for thousands of dollars of estate money to be frittered away in payment for luxury or non-estate items bearing no relationship to decedent's business and its debts.

Under Disciplinary Rule 6-101 A(3) a lawyer is required not to neglect matter entrusted to him. This, of course, applies to practice in the state courts of Pennsylvania and is cited in a cautionary fashion, as a makeweight in sustaining the surcharge already imposed by reason of the failure to comply with bankruptcy statute and rules.

Respondent, Robert O. Lampl, Esq., will be required to disgorge all counsel fees in the amount of $3500 paid to him in connection with the Low-Vol Fuels bankruptcy proceedings. The petition and citation will be dismissed as to the $10,000 Malley loan and the two $2000 checks paid to Ford Motor Credit Company. The $1000 fee retained from the Fayette realty sales was not the subject of petition and citation and will at this time not be surcharged.

Any claim for unpaid fees will be denied.

(Emphasis added). (EX B-9 at 9-10).

17. Attorney Lampl's appeal of the February 29, 1988 opinion and order, along with the denial of the October 26, 1987 recusal motion was quashed as untimely. The Superior Court did not address the merits of the recusal motion or the order. (EX B-62; Ex R-18).

18. On July 29, 1988, Attorney Lampl filed a motion for reconsideration of the February 29, 1988 order expanding upon its grounds for recusal and specifically requesting that a second judge rule on the recusal motion. On August 8, 1988, Judge Ross denied the motion for reconsideration. (EX R-4; EX R-16).

19. On August 18, 1988, Attorney Lampl filed exceptions to the August 8, 1988 order. On August 19, 1988, Judge Ross entered an order dismissing the exceptions. (EX R-17).

20. On December 2, 1988, Attorney Lampl's appeal from the August 8, 1988 and August 19, 1988 order was quashed, again on *procedural* grounds. (EX. B-62).

21. To date, no one but Judge Ross has passed on the merits of Attorney Lampl's motion to have Judge Ross recuse herself on the basis of her acknowledged *ex parte* communications with Judge Cosetti, Judge Markovitz, and Justice Larsen, relating to the *Estate of Francis* case while it was pending before her. We note that her acknowledged discussions with Attorney Vaira and U.S. Attorney Johnson also involved *ex parte* discussions of the *Estate of Francis* case.

22. Attorney Lampl and Attorney Ashton both denied ever speaking to Justice Larsen about the *Estate of Francis* case. Justice Larsen denies having spoken with Attorney Lampl or Attorney Ashton regarding the *Estate of Francis* case. (Ashton, TR at 245; Lampl, TR at 72; Larsen, TR at 2520, 2552).

23. Neither Attorney Lampl, nor Attorney Ashton, nor Judge Ross found anything in the rule to show cause which would demonstrate a need or motive for Justice Larsen (or anyone else) to intervene on Attorney Lampl's behalf in the *Estate of Francis* case. (Ross, TR at 936-37; Lampl, TR at 75; Ashton, TR at 246).

24. Justice Larsen denies intervening with Judge Ross on

behalf of Attorney Lampl or Attorney Ashton, in connection with the *Estate of Francis* case. (Larsen, TR at 2545-47, 2555, 2738-39).

25. Based upon the foregoing, we find that:

— there was no need for Justice Larsen to attempt to influence Judge Ross on Attorney Lampl's behalf in the *Estate of Francis* case.
— Justice Larsen did not intervene on Attorney Lampl's behalf in the *Estate of Francis* case.

B. FAIRFIELD TOWNSHIP LAND PURCHASE

1. In September 1971, Mr. Nikolai Zdrale purchased a 34.8-35.9 acre tract of undeveloped land in Fairfield Township, Westmoreland County. (Zdrale, TR at 1239; Smith TR at 1604).

2. For seven years prior to the fall of 1985, Mr. Zdrale had tried to sell the property. No asking price was set; all offers were to be entertained. It was advertised for sale and listed with a couple of realtors, however, no offers were received. (Zdrale, TR at 1239-40, 1291, and 1303).

3. There were several substantial hindrances identified by Mr. Zdrale, Attorney Lampl, Attorney Ashton, Justice Larsen, and expert real estate appraisers Daniel Smith and Glen Ray, which would drive away prospective buyers and/or reduce any offer for the property:

a) The property was remote undeveloped land, with no available utilities except electricity, which was accessible only by unpaved roads in a Township with no local police protection, no fire protection, and no zoning code. (Lampl, TR at 110-13; Smith, TR at 1619-20; Ray, TR at 506-07; Larsen, TR at 2530).

b) Man-made lakes located on the property and covering approximately one-third of the total acreage of the property were held by earthen dams which were in a state of disrepair; trees, shrubs, and especially weeping willows growing on and near the face of the dams severely threatened its structural

integrity; the dam was already suffering leakage and heavy overflow and was in violation of Pennsylvania Department of Environmental Resource regulations. The lake and dams were liabilities rather than assets in that condition, and could cost between $20,000 and $30,000 to repair, which is more than it would cost to install such lakes originally. There would also be an extremely high maintenance cost for such lakes. (Zdrale, TR at 1240-41; Smith, TR 1600-17, 2313, 2325).

c) The property was heavily encumbered with liens. When it was first offered for sale it was encumbered with over $700,000 in liens. Attorney Ashton indicated in November 1985 that the property was then subject to approximately $300,000 in liens. In February 1986, when Justice Larsen purchased the property, he took subject to over $180,000 in liens for liquidated claims as well as subject to indeterminate liens for any judgment which might eventually be entered against Mr. Zdrale in five then pending law suits. The property was at all times involved subject to liens far in excess of the value of the property. No money could be borrowed on the property in those circumstances. (Zdrale, TR at 1239 1243); Ashton TR at 204-06; Larsen, TR at 2523; EX B-72).

d) Mr. Zdrale's only chances of extinguishing the liens and thereby clearing title to the property were the possible sale of a landfill in which he had a substantial *non-voting* interest, and an anti-trust suit he was prosecuting as plaintiff. When Justice Larsen's purchase was being negotiated, Attorney Ashton, who represented Mr. Zdrale, estimated Mr. Zdrale's chances of extinguishing the liens as one in ten. Mr. Zdrale was even less optimistic in this regard placing his chances at zero. (Ashton, TR at 213; Larsen, TR at 2525; Zdrale, TR at 1244).

e) Between 1983 and 1986, a considerable number

of arson fires had occurred in the area around the property, with several arson fires involving second homes of absentee owners. The threat of such arson has a depressing effect on property values. (Lampl, TR at 110; Ashton, TR at 203; Ray, TR at 500; Smith, TR at 1619; Larsen, TR at 2530).

f) The Fairfield Township area is a depressed area, which has a negative effect on property values generally. (Smith, TR at 1621).

4. Although the precise value of the property unencumbered by liens is contested, all agree that it was worth only a small fraction of the $180,000 value Mr. Zdrale had placed on the property in the bankruptcy papers he filed:

a) Justice Larsen testified that after checking with various real estate agents in the area, he had learned that the asking price for land in that general area was between $400 and $1,000 an acre or between $14,000 and $35,000 for an undeveloped 35 acre parcel. (Larsen, TR at 2526).

b) Attorney Ashton received a rough opinion from land developer Alan Paterson that unencumbered, the Zdrale property could be worth no more than $30,000. The record does not disclose whether Mr. Paterson inspected the property or was aware of the condition of the dams. (Ashton, TR at 203).

c) Mr. Smith, a well-qualified real estate appraiser, set the value of the property (if unencumbered by liens) at $21,000-$24,000, without discounting for the expense of repairing the dams or removing the lakes. His detailed testimony was supplemented by a detailed appraisal report which is included in the record. (Smith, TR 1617, 2325, EX R-33).

d) Glen Ray, the appraiser selected by the Board, set the value of the property at $42,000. In his tes-

timony he indicated that the lakes significantly enhanced the value of the property and that $22,400 of the total value was attributable to the lakes. He noted that when he visited the property in January of 1988, he saw nothing wrong with the dams. Mr. Ray filed a brief report in support of his appraisal. (Ray, TR 490-510; EX B-22).

5. We find that each of the appraisals is within a range of reasonable variance given the subjective nature of expert real estate appraisals.

6. We note that Mr. Ray's testimony indicated a more cursory inspection of the property and especially of the dams. We further note that the lakes would have been frozen in Western Pennsylvania in January when Mr. Ray conducted his on-site appraisal, making careful inspection of the dams difficult, if not impossible. But for the material difference in their treatment of the lakes as an asset or as a liability, both Mr. Smith and Mr. Ray appear to agree on a base value in the $21,000 to $42,000 range for the Zdrale property, if unencumbered by liens, and if the dams were not in disrepair.

7. We note that there was some limited potential for latent bias on Mr. Ray's part against Justice Larsen as the result of Mr. Ray's unsuccessful attempt to sell Justice Larsen a 52 acre parcel of undeveloped land in Cook Township, Westmoreland County in 1983, for an asking price of $8,000. Disagreement over price and Mr. Ray's commission impeded the deal. We do not consider this arguable potential for bias to be material to our analysis. Interestingly, however, that property was sold in November 1985 for $70,000, demonstrating both the volatile shifts which occur in the value of undeveloped land, and the speculative nature of investments in such land. (Ray, TR at 509-10).

8. In September or October of 1985, Attorney Ashton began representing Mr. Zdrale in an anti-trust matter Mr. Zdrale was pursuing as plaintiff. (Ashton, TR at 181).

9. Attorney Ashton became aware of Mr. Zdrale's critical financial condition and referred him to Attorney Lampl who thereafter represented Mr. Zdrale in his business bankruptcy.

Attorney Ashton was also co-counsel of record in the bankruptcy matter and appeared with Attorney Lampl at some of the hearings, though Attorney Lampl was primarily responsible for the bankruptcy case and Attorney Ashton was not experienced in bankruptcy matters. (Ashton, TR at 181; Lampl, TR at 49-51; EX B-1; EX B-4).

10. During his representation of Mr. Zdrale in the anti-trust matter, Attorney Ashton became aware of Mr. Zdrale's desire to sell his Fairfield Township property. (Ashton, TR at 199; Zdrale, TR at 1291).

11. Attorney Ashton had been disbarred in the early 1970's as the result of problems related to his alcoholism. In 1984, Attorney Ashton was readmitted to the Pennsylvania and federal bars following his substantial rehabilitation. (Ashton, TR 180, 192).

12. Following his reinstatement, Attorney Ashton met Justice Larsen for the first time at a social gathering; they discussed Attorney Ashton's struggle against alcoholism and his efforts to renew his practice. Justice Larsen became a concerned and supportive friend, and helped Attorney Ashton in his continued struggle with alcoholism as well as through subsequent battles with cancer which twice required surgery. Justice Larsen informed Attorney Ashton early in their friendship that he would recuse himself in any matter involving Attorney Ashton which came before him. (Ashton, TR at 193, 246, 285-86; Larsen, TR at 2518-19).

13. Under the Pennsylvania Code of Judicial Conduct, a Judge or Justice's opportunities for financial investment are severely restricted. Real estate investment is one of the few financial activities specifically authorized by the Code. Pa.Code of Judicial Conduct Canon 5 (*see especially* Canon 5(C)(2)). Thus, real estate as an investment opportunity has unique value to judges which it would not have to others who may choose freely from a wide array of investment opportunities forbidden to judges.

14. Justice Larsen had for several years been looking to acquire some undeveloped rural land. His daughter and secretary confirmed this fact. It was also confirmed by the real estate appraiser selected by the Board, Mr. Ray. Attorney Ashton had

become aware of Justice Larsen's general interest in purchasing undeveloped rural land as the result of various social conversations with Justice Larsen. (Ashton, TR at 190, 204, 261-61; Ray, TR at 508-09; N. Larsen, TR at 1390; Roberts, TR at 1414-15; Larsen TR at 2523-24).

15. Sometime in November 1985, Attorney Ashton had a chance meeting with Justice Larsen in front of Justice Larsen's office at the Grant Building in Pittsburgh during which he mentioned to Justice Larsen the availability of the Zdrale property. Attorney Ashton described the property favorably, but noted the speculative nature of any purchase in light of the considerable outstanding liens. Justice Larsen indicated interest, and it was agreed that Attorney Ashton would obtain pictures for Justice Larsen to review. (Ashton, TR at 204-06; Larsen, TR at 2523-25).

16. Justice Larsen reviewed the five sequential photographs forwarded by Attorney Ashton, and was sufficiently interested to walk the property with Attorney Ashton sometime between Thanksgiving and Christmas in 1985. (Ashton, TR at 205-06; Larsen, TR at 2525-27).

17. In light of the drawbacks noted in finding 3, and especially the one in ten chance of ever receiving clear title to the property, Justice Larsen settled on an offer of $5,000.00. Justice Larsen's method of arriving at this offer price was to take the highest per acre asking price in the area, add $15,000 for the lakes (which he apparently considered assets, not having Mr. Smith's expert assessment of the state of disrepair of the dams at that time), and divide by 10, in light of the one in ten chance of gaining title. (Larsen, TR at 2526).

18. As the result of his receipt of a $30,000 rough appraisal value from a developer for the property if unencumbered and notice of a possible deal in the works for the landfill, Attorney Ashton recommended to Mr. Zdrale that he reject Justice Larsen's offer. (Ashton, TR at 203, 210-11; Zdrale TR at 1258-59).

19. Mr. Zdrale nonetheless accepted the offer. He was ill, destitute, and pessimistic about his chances for economic recovery. He had no control over the landfill deal, and no meaningful (*i.e.* reasonably binding) options agreements had yet been signed. The $5,000.00 offer was the only offer for the Fairfield Township property he received despite having tried

to sell the property for over seven years. The $5,000 offer was his only certain source of cash for the foreseeable future, and so in December 1985 Mr. Zdrale indicated his acceptance of Justice Larsen's offer. He also indicated that despite his improved prospects in late January and early February after the first non-binding option agreement on the landfill sale was made, he did not want to go back on the gentlemen's agreement reached in December when prospects were gloomier; he simply did not want to go back on his word. Finally, even after it became apparent that the liens would be paid off, Mr. Zdrale indicated that he still considered the $5,000 price fair, because of the high cost he expected to be necessary to repair the dams on the property. (Zdrale, TR at 1239, 1241, 1244-45, 1258-59; Lampl, TR at 106-07, 114-16).

20. In late January 1986, Justice Larsen and his daughter signed the draft agreement prepared by Attorney Ashton. The agreement listed all encumbrances, including several business liens. (Ashton, TR at 197-98, 209-210; EX B-7A).

21. In February, the landfill deal looked promising and Attorney Lampl felt that even if current negotiations did not succeed, a deal on similar terms could be completed in the near future. Attorney Ashton advised Mr. Zdrale not to finalize his land deal with Justice Larsen, but Mr. Zdrale went ahead with it against counsel's advice. (Ashton, TR at 210-13, 263-64; Zdrale, TR at 1258-59; Lampl, TR at 51-52, 135-138).

22. On February 20, 1986, Justice Larsen's secretary, Mrs. Roberts, drafted a check for $5,000 to Mr. Zdrale to finalize the agreement. The transfer of the encumbered deed from Mr. Zdrale to Justice Larsen and his daughter was made the same day. (Roberts, TR at 1415; EX B-44).

23 Mr. Zdrale met Justice Larsen after the sale was completed, and did not know until that time that he was a Justice of the Pennsylvania Supreme Court. Mr. Zdrale spoke with Justice Larsen only once, when he showed him the property boundaries after the sale. (Zdrale, TR at 1241-42).

24. Three months after Justice Larsen purchased the Zdrale property, the sale of the landfill in which Mr. Zdrale was interested was finalized. Mr. Zdrale eventually paid all creditors 100% of debts owed, including lien holders on the Zdrale property sold to Justice Larsen. Justice Larsen and his daugh-

ter then received clear title to the land purchased from Mr. Zdrale. Mr. Zdrale still realized over $400,000 from the landfill sale for himself. Lampl, TR at 122-03; Ashton, TR at 223; EX B-1).

25. Attorney Lampl represented Mr. Zdrale in his Chapter 11 business reorganization/bankruptcy matter during this time period. Because of various business liens, the Fairfield Township property was part of the Zdrale business bankruptcy estate. Attorney Ashton mistakenly assumed that because the property was held by Mr. Zdrale personally it would not be involved in a Chapter 11, business reorganization/bankruptcy matter. In hindsight, Attorney Ashton acknowledged that he should have sought approval of the sale of the Zdrale property from the Bankruptcy Court as the result of the various business liens recorded against it. No challenges to the sale were raised in the bankruptcy proceedings, however, in light of the contemporaneous landfill deal, and the subsequent extinguishment of all creditors' claims by payment in full.

26. There is no evidence to suggest that anyone involved became aware of Attorney Ashton's error until it had already become moot.

27. Based upon the foregoing, we find that:

— Attorney Ashton's first discussion of the Zdrale property with Justice Larsen occurred approximately two to three months before a rule to show cause was ever issued to Attorney Lampl in *Estate of Francis*;

— Attorney Lampl was not involved in the land deal;

— Attorney Lampl's attorney in the estate case, Attorney Ashton, though instrumental in initiating the land deal, nonetheless specifically advised Mr. Zdrale to reject Justice Larsen's offer; and therefore,

— The Fairfield Township land deal provided no motive for Justice Larsen to attempt to influence Judge Ross on Attorney Lampl's behalf in the Estate of Francis case.

C. THE LARSEN/ROSS MEETING

1. Justice Larsen and Judge Ross were the nominees of the same party, were elected together, and served together on the Allegheny County Court of Common Pleas between

1974 and 1978. (Ross, TR at 814; Larsen, TR at 2506-07).

2. Justice Larsen and Judge Ross had until these proceedings enjoyed courteous professional relations. (Larsen, TR at 2537, 2552; Roberts, TR at 1403-03).

3. Justice Larsen testified that prior to May 30, 1986, he had received informal complaints from Judge Zavarella and others regarding Judge Ross' professional and personal conduct. None of the complaints involved good cause to believe Judge Ross had committed ethical violations which would be required to be reported to disciplinary authorities; but, the complaints and concerns, if left unaddressed, could have affected her personally, professionally, and politically. (Larsen, TR at 2540-44).

4. The existence of such complaints and rumors was confirmed by the testimony of Judge Zavarella and Attorney Lampl. Judge Zavarella specifically testified that he had discussed various concerns regarding Judge Ross' judicial conduct directly with Judge Ross, and that as his discussions with her had not been productive, he discussed the same concerns with Justice Larsen in the hope that Justice Larsen would intervene informally. Attorney Lampl discussed several concerns and rumors he was aware of, which were generally circulating among attorneys regarding Judge Ross' personal and judicial conduct. Because the rumors were wholly collateral to these proceedings, no attempt was made to determine their truth or falsity. We note that none of the complaints questioned her ability to understand or recall information she received from others. (Zavarella, TR at 1321-83; Lampl, TR at 76-81).

5. It has been common practice in Pennsylvania, and other jurisdictions, for judges to informally notify or admonish colleagues regarding complaints circulating about their personal or professional conduct; Administrative Judges and Appellate Court Judges (including Supreme Court Justices) have been active in this respect. (Zavarella, TR at 1319-84; Larsen, TR at 2540-44; *cf.* McDevitt, *Judicial Disability and Removal Commissions*, 45 Pa.B.A.Q. 118, 119 (1974); Note, *Remedies for Judicial Misconduct and Disability*, 41 NYULR 149, 168-69 (1966)).

6. On Friday, May 30, 1986, Justice Larsen visited Judge Ross in her chambers and engaged in a conversation. No one else was present, and the conversation was not recorded.

(Larsen, TR at 2540-48; Ross, TR at 806-07).

7. Justice Larsen testified that he went to see Judge Ross regarding complaints he had received from Judge Zavarella and others, including particularly negative comments he had overheard in the steamroom at his club. He indicated that he communicated these matters to her as a friend and concerned colleague, and that he was not making any accusations himself. He further testified that he recalled receiving a call from Judge Ross later that day or shortly thereafter, in which she seemed quite concerned and asked if Justice Larsen thought anyone would press a formal complaint against her; and that he reassured her that he thought that was unlikely. (Larsen, TR at 2537-47).

8. Judge Ross remembered the May 30, 1986 conversation dramatically differently. On August 30, 1988, she testified that the May 30, 1986 conversation began generally. She recalled that they discussed: her University of Pittsburgh trustees meeting and the conflict then arising over South African divestiture; the excellent performance of an attorney Judge Ross had appointed to represent a party in the Supreme Court; the possible outcome of a case then pending before the Supreme Court; and, the status of a Senior Judge of the Superior Court. Judge Ross indicated that Justice Larsen eventually stated, "listen, I met two guys on the street and they said to tell Judge Ross in the Homer Douglas Francis case that John Botula took all the money and used it to buy a condominium in Florida." She indicated that she had responded that she knew about the condominium, and then told Justice Larsen that he was wrong about who got all the money and listed for Justice Larsen who got what, including the $17,000 which went to Attorney Lampl, but that Justice Larsen replied, "you are doing a good job, but Jon Botula is the one, you go after Jon Botula." She indicated that Justice Larsen then got up and left pleasantly. Judge Ross also recalled a follow-up call she made to Justice Larsen to find out if his confidential informants would come forward, but that Justice Larsen indicated that they would not. (Ross, TR at 801-33).

9. Judge Ross flatly denied that Justice Larsen, or anyone else (specifically including Judge Zavarella), had ever raised complaints or concerns to her regarding her judicial conduct.

(Ross, TR at 1001-1004).

10. Justice Larsen flatly denied Judge Ross's account of the meeting. He indicated that he did not recall discussing any of the introductory topics noted, and testified further that he had not even heard of the *Estate of Francis* case until October 1987. (Larsen, TR at 2515).

11. On Monday, June 2, 1986, Judge Ross sat on an *en banc* panel hearing motions in the *Estate of Francis* case with Judge Schwartz and Judge Zavarella. Judge Ross did not communicate the fact or content of her discussion with Justice Larsen to her colleagues on the panel or to the parties, nor did she report it to this Board, as would have been required if Judge Ross had considered Justice Larsen's conversation to have constituted an improper *ex parte* communication or an attempt to influence her. (Pa.C.J.C. Canon 1; Pa.C.J.C. Canon 3(B)(3)). Judge Ross did not inform the parties or her colleagues on the *Estate of Francis* case of the conversation any time after that. (Ross, TR at 822, 861, 941; EX R-3; EX R-4; EX R-16; EX R-17).

12. On Thursday, June 5, 1986, six days after her meeting with Justice Larsen, Judge Ross contacted former United States Attorney Peter Vaira. Judge Ross was a personal friend of Attorney Vaira's uncle, whom Attorney Vaira described as his "mentor." Judge Ross had worked with Attorney Vaira previously on a separate matter. In his testimony on August 31, 1988, Attorney Vaira indicated that he did not take notes of his discussion with Judge Ross on June 5, 1986, and that his memory of the precise content of their conversation was not clear; but, Judge Ross had indicated in general and "circumspect" terms that Justice Larsen had given her a tip about possible bankruptcy fraud in an estate case based upon information he had received from someone on the street. Attorney Vaira indicated that she had given him no reason to suspect that Justice Larsen had acted from anything but the purest motives in providing her with the "tip" concerning her case. Attorney Vaira conceded that he had no first-hand knowledge of the meeting between Judge Ross and Justice Larsen, and no recollection of any further information from Judge Ross. We note that Attorney Vaira also testified that he had "handled matters involving sensitive political matters like this"

before, and that "I know a lot of hearsay, and some people have called me," but that he had no further first-hand information to relate to the Board. (TR at 1026-27). Attorney Vaira recommended that she discuss the tip with Western District of Pennsylvania United States Attorney Alan Johnson; and he also suggested that she make a written record of the tip which she indicated was "a good idea." She did not indicate that she had already begun such a record in her diary. (Vaira, TR at 1024-46).

13. Judge Ross' acceptance of Attorney Vaira's suggestion that she make a written record of the tip as "a good idea" at least arguably suggests that any notes of the May 30, 1986 meeting made by Judge Ross were made at least six days after her meeting with Justice Larsen; though, on the other hand, it may reflect only the degree of circumspection she exercised in her conversation with Attorney Vaira. (Ross, TR at 801-33; Vaira, TR 1024-46).

14. Attorney Vaira characterized his impressions as follows, "I presumed that the Justice [Larsen] had the best of motives and was not good at these kinds of things. Quite often judges may not be as good as we law enforcement people are in taking statements." (Vaira, TR at 1045).

15. According to the Board interviewers' report contained in EX R-23, when interviewed by Board investigators on November 9, 1987, Attorney Vaira indicated that Judge Ross had informed him that Justice Larsen had suggested that mob figures or narcotics were involved, and that it was the narcotics aspect which led him to suggest to Judge Ross that she contact U.S. Attorney Alan Johnson. At the hearing in this matter on August 31, 1988, Attorney Vaira reviewed EX R-23 and specifically affirmed its accuracy. (TR at 1047). However, following direct and cross-examination, on supplemental inquiry by Board Member Hoyle Attorney Vaira indicated that Judge Ross had made no mention of "narcotics" or "mob figures" and that those references were merely inaccurate interpolations he had made, the source of which he did not know. (TR at 1048-49). Thus, his reference to the "mob figures" or "narcotics" appears to be a classic "interpolation" type innocent fallacy of testimony, as there is no other indication that Judge Ross or Justice Larsen ever made such a reference. This

underscores the effects of the passage of time on the recollections of even the most forthright and disinterested witnesses in this matter. (Vaira, TR at 1047-50; EX R-23).

16. Attorney Vaira testified that Judge Ross seemed "uncomfortable" about Justice Larsen's visit (TR at 1026-27, 1038). However, when specifically asked by Board Member Higgins, whether Judge Ross' concern, as Attorney Vaira recalled perceiving it, was inconsistent with his perception that Justice Larsen had been acting from the best of motives, Attorney Vaira explained that it was not inconsistent, and that the discomfort which he was describing was that which would naturally arise from the fact of the *ex parte* contact, regardless of whether Justice Larsen had the best of motives for giving Judge Ross the tip. (TR at 1050-51).

17. On October 13, 1987, Judge Ross told the FBI that she had gone to Attorney Vaira because she thought Justice Larsen had tried to influence her improperly. Judge Ross' own prior and subsequent statements and conduct, as well as Attorney Vaira's testimony, however, reveal that Judge Ross suspected no attempt to influence her for an improper motive at the time of her meeting with Attorney Vaira. (Vaira, TR at 1024-46; Ross, TR at 823-04, 865-87; EX R-1a; EX R-21, EX R-22).

18. The indication in the interlineation on Judge Ross' diary page that she had discussed the May 30, 1986 conversation with Attorney Vaira at "Cindrich's" (a Pittsburgh law firm) was incorrect. Her conversation with Attorney Vaira had not taken place at "Cindrich's." The indication in the diary entry that she asked Vaira "if Larsen's tip was a crime" was also inaccurate; she had actually asked whether the conduct the alleged tip concerned was criminal, *i.e.* would the conduct suggested constitute federal bankruptcy fraud. Arguably, neither the error nor the inaccuracy were mistakes likely to be made in contemporaneous accounts of events, though they were of a type likely to occur in an attempt to reconstruct events later from a more distant past. It is possible that Judge Ross may have been mistaken as to when the diary entries had been made. (Vaira, TR at 1024, 1035-07; Ross, TR at 988-99; EX R-21; EX R-22).

19. On Monday, June 9, 1986, Judge Ross had a telephone

conversation with Western District of Pennsylvania United States Attorney Alan Johnson, regarding her May 30, 1986 conversation with Justice Larsen. By the time of the August 31, 1988 hearing before this Board, U.S. Attorney Johnson had no independent recollection of his conversation with Judge Ross more than two years earlier, a fact he freely and forthrightly conceded. He did authenticate a brief hand written note he had made at the time of the call, and a brief typed memo made shortly after the call. Both indicated that Judge Ross had informed him that Justice Larsen had passed on a tip to Judge Ross that he had received from two men on the street that Jon Botula had received the money in the *Estate of Francis* case, and that Judge Ross was reporting it to him as a tip on a possible bankruptcy fraud. He indicated that his notes did not reflect an attempt to make a verbatim record of his conversation with Judge Ross. The notes and memorandum do not reflect, nor did U.S. Attorney Johnson recall, that Judge Ross had in any way intimated that Justice Larsen had attempted to influence Judge Ross improperly, or that Justice Larsen had done anything more than pass on a tip based on hearsay regarding her case. There is no mention of mob figures or narcotics in U.S. Attorney Johnson's notes or memo; thus, confirming that Attorney Vaira's reference to mob figures or narcotics was merely an inadvertent interpolation on his part, and an example of an innocent fallacy of testimony. (Johnson, TR at 1051-59; EX R-23).

20. Judge Ross conceded at the August 1988 hearing before this Board that she had reported the matter to U.S. Attorney Johnson solely as a tip regarding possible bankruptcy fraud, and not as a complaint regarding Justice Larsen's alleged misconduct. Like her October 13, 1987 report to the FBI regarding her conversation with Attorney Vaira (*See* I, C, 14), her October 13, 1987 report to the FBI included a similarly inaccurate characterization that her report to U.S. Attorney Johnson had involved a complaint against Justice Larsen, rather than merely the transmission of the tip alleged to have been received from Justice Larsen by Judge Ross to U.S. Attorney Johnson. (Johnson, TR at 1051-59; Ross, TR at 891-92; EX R-1; EX R-1a).

21. Judge Ross stated in her testimony before this Board

that her only occasion between May 1986 and December 1986 to discuss the content of Justice Larsen's alleged attempt to influence her was with Judge Cosetti of the Federal Bankruptcy Court who was presiding over a related case. She admitted to having initiated several *ex parte* conversations with him regarding the *Estate of Francis* case, and she stated that she told him during one of those conversations that "Justice Larsen came to see me and said 'look, I met two guys on the street and they said to tell Judge Ross in the Homer Douglas Francis case that John Botula got all the money and put it in a condominium in Florida'." Significantly, Judge Ross' own version of her *ex parte* conversation with Judge Cosetti omits any reference to the critical follow-up comments, "Botula's the one, you go after Botula," which Judge Ross included in other reports of the May 30, 1986 exchange between she and Justice Larsen. (Ross, TR at 819-21).

22. By stipulation, Judge Cosetti flatly denied Judge Ross' assertion. The stipulation provides as follows:

> It is hereby stipulated and agreed among the parties that Judge Joseph P. Cosetti of the Bankruptcy Court of the Western District of Pennsylvania, if called to testify, would testify that he had a number of telephone conversations with Judge Ross in 1986 and 1987. That the substance of those conversations was the handling of the Low-Vol Fuels case in the Bankruptcy Court and how it impacted on the Homer Douglas Francis Estate before Judge Ross. He would also testify that he does not remember Judge Ross telling him that Justice Larsen had intervened with her on the Francis estate and that fact, if clearly communicated to him, would be so unusual that he would probably remember it.

We find Judge Cosetti's denial, rather than Judge Ross' assertion, to be credible. (Cosetti, by stipulation, TR at 132-33).

23. On December 12, 1986, the Pennsylvania AFL-CIO presented Justice Larsen with their Judicial Excellence Award. In connection with that occasion, and despite Judge Ross' testimony that Justice Larsen had attempted to influence Judge

Ross improperly in the *Estate of Francis* case six months earlier, Justice Larsen received the following note from Judge Ross on November 25, 1986:

> "Dear Justice Larsen: I was pleased to send a contribution of $50.00 to the labor tribute dinner in your honor. I cannot attend because I recently had my arm and hand operated on for severed tendons. I hope the dinner is a success. Happy Thanksgiving. Sincerely yours" "Eunice" (written) "Eunice Ross" (typed).

Judge Ross acknowledged sending the note, but discounted it as merely a "courteous" note. (Ross, TR at 980-81; EX R-20)

24. On March 26, 1987, Justice Larsen and Judge Ross attended a viewing for Judge Watson's deceased mother. Justice Larsen sat by Judge Ross and had a friendly conversation with her. Judge Ross asked Justice Larsen if he could arrange to have her included on the dais, rather than merely in the audience, for the upcoming AFNA Dinner at which Mrs. Anwar Sadat was to be the featured speaker. Justice Larsen told her he would look into it, and in fact arranged for Judge Ross to be moved onto the dais. (Larsen, TR at 2550-01; Ross, TR at 901, 979).

25. On Sunday, April 19, 1987, an article by Jack Grochet and Richard Gazarick regarding an FBI investigation into the Zdrale bankruptcy appeared on Page A-1 of the Greensburg *Sunday Tribune Review* with a large picture of Mr. Zdrale and Attorney Lampl. The article was continued on page A-10 with a large picture of Justice Larsen who was by then campaigning for his retention election in the fall. The article suggested possible impropriety with respect to the sale of Mr. Zdrale's Fairfield Township property to Justice Larsen. The story noted that Attorney Ashton and Attorney Lampl represented Mr. Zdrale. *See* Grochet & Gazarick, "Land Sale Scrutinized: FBI Looking Into Zdrale Bankruptcy," *Sunday Tribune-Review*, at A-1, A-10 (Greensburg, Pa. 4/19/87).

26. Judge Ross indicated that upon reading that article she became convinced that Justice Larsen's conversation with her a year earlier had been part of a pattern of events which

indicated that Justice Larsen had passed the tip on to her in an effort to aid Attorney Lampl, and his attorney in the *Estate of Francis* case, Attorney Ashton, in return for Attorney Ashton's role in the Zdrale land deal. (Ross, TR at 874-75).

27. On cross-examination, Judge Ross' testimony on this point at the August 30, 1988 hearing before this Board was somewhat confused. At several points she indicated that she first drew negative inferences about Justice Larsen's motives as a result of the April 19, 1987 article. (Ross, TR at 823-24, 871, 873-75). In the same testimony, however, she indicated that she felt from the beginning that Justice Larsen was suggesting that she go after Jon Botula and not the others, despite her knowledge from bank records that others had also received money, and that he was telling her, in effect, to find a fact in a case before her regardless of what the evidence proved. (Ross, TR at 828, 831-33, 835-36, 862). Upon further examination, however, Judge Ross conceded that she had not interpreted Justice Larsen's words to her as anything but a tip about possible bankruptcy fraud in the *Estate of Francis* case until after she read about the Zdrale land deal in the April 19, 1987 article, and that only then did she reinterpret his meaning and intent, and decide that the conversation should be reported. (Ross, TR 875-88).

28. Judge Ross did not report Justice Larsen's alleged attempt to influence her improperly to the parties or her colleagues on the *Estate of Francis* case, despite her reinterpretation of the meeting following review of the April 19, 1987 article.

29. This Board takes official notice of the fact that Judge Ross participated in a teleconference meeting of the JIRB on May 18, 1987, a full month after the appearance of the April 19, 1987 newspaper article, but that Judge Ross made no report of the fact, content, or presumed import of her May 30, 1986 conversation with Justice Larsen as Canon 1 and Canon 3B (3) would require if she had been of the opinion then that Justice Larsen had attempted to influence her improperly. We take further notice of the fact that she remained silent on this point despite the fact that the April 19, 1987 article was itself discussed by the Board during that meeting and despite the fact that she voted with the Board to issue a letter of inquiry

to Justice Larsen regarding the content of that article. (Minutes of JIRB Conference Call Meeting 5/18/87; *see also* Rowley, TR at 1117, 1126); *see Falasco v. Commonwealth Probation and Parole Board*, 521 A.2d 991 (1987)(regarding "official notice").

30. Judge Ross testified at the August 1988 hearing that she had reported the fact, content, and presumed import of her May 30, 1986 conversation with Justice Larsen, to JIRB Chairman Judge James Rowley on May 26, 1987, while en route from the Harrisburg Airport to the JIRB headquarters in Harrisburg. (Ross, TR at 822-31).

31. Judge Rowley testified, however, that while Judge Ross had mentioned the article and that Justice Larsen had been to see her, Judge Ross had not indicated that Justice Larsen had attempted to influence Judge Ross, and that if she had indicated that, it would have struck him "like bolt of lightening," and that he would certainly have remembered it. (Rowley, TR at 1130). We find Judge Rowley's denial, rather than Judge Ross' assertion, to be credible. Moreover, we note that not only did she not report the incident to Judge Rowley as alleged, but she failed to report the incident subsequently at any of the numerous Board meetings or one-on-one contacts she had with Judge Rowley prior to her actual first report of the incident to Board Counsel Robert Keuch in September 1987. (Rowley, TR at 1110-32, 1034; Ross, TR at 822-25, 830-31, 897-98).

32. On July 8, 1987, a hearing was held in the *Estate of Francis* case at which Judge Ross indicated her tentative satisfaction with Attorney Lampl's explanation of his conduct in that case. It does not appear that at that time she suspected Attorney Lampl of conspiring with Justice Larsen and Attorney Ashton, to influence her improperly. (EX R-5).

33. We conclude that Judge Ross' reinterpretation of the May 30, 1986 meeting as the result of the April 19, 1987 article probably did not take its final, settled form until sometime after the JIRB meeting May 18, 1987, and the July 7, 1987 hearing in the *Estate of Francis* case.

34. On or about, October 16, 1987, Justice William Hutchinson formally resigned his position as Justice of the Pennsylvania Supreme Court in order to assume the post of Judge of the Third Circuit Court of Appeals. His nomination to the

Third Circuit post was rumored in the legal press as early as May 4, 1987. Between June 6, 1987, and June 26, 1987, reports of confirmation of the pending nomination by aides to Senators John Heinz and Arlen Specter were published in major newspapers. The nomination was formally submitted on June 26, 1987, and was formally confirmed by the United States Senate on August 7, 1987. We note that during this time many presidential nominations were not acted upon, and so until confirmation, the likelihood of a vacancy occurring on our Supreme Court as the result of a resignation by Justice Hutchinson was a matter of prognostication and speculation rather than certainty. These dates coincide with the timing of Judge Ross' reinterpretation of her May 30, 1986 conversation with Justice Larsen. *See Sprague v. Casey*, 520 Pa. 38, 50, 550 A.2d 184, 190 (1988). *See e.g.* "Around the State - Third Circuit Picks," *Pennsylvania Law Journal Reporter*, Vol. X No. 18 at 1 (May 4, 1987)(Senator Heinz' aide disclosed that President Reagan was planning to appoint State Supreme Court Justice Hutchinson to a vacant Third Circuit post); "Justice Dept. to Act on Judgeships," *Philadelphia Inquirer, at* ____ (June 6, 1987)(Senator Specter confirmed that Justice Hutchinson was a likely nominee); "Around the State-Judicial Nominees," *Pennsylvania Law Journal Reporter*, Vol. X, No. 24, at 1 (June 15, 1987)(Senators Specter & Heinz confirmed that Justice Hutchinson is nominee); "Reagan to Name Two Pennsylvania Judges to Federal Court," *Allentown Morning Call*, at____ (June 21, 1987)(White House announced that the President will nominate Justice Hutchinson); "Committee May Vote August 4 on Hutchinson Nomination," *Pottsville Republican*, at ____ (July 25, 1987)(Senate-Judiciary Committee to vote as early as August 4 on Justice Hutchinson's nomination); Stoffer, ". . . as high court justice assumes U.S. post," *Pittsburgh Post Gazzette*, at ____ (Oct. 17, 1987)(Hutchinson will resign and take new seat on same day [Monday, Oct. 19, 1987]; "Around the State - Third Circuit Addition," Pa.L.J.R. Vol. X, No. 42 at 1 (Justice Hutchinson was nominated in June, unanimously confirmed in August, and sworn in October 19, 1987).

35. In September 1987, Judge Ross made a formal complaint against Justice Larsen to Board Counsel Keuch regarding Justice Larsen's May 30, 1986 conversation with her. This

was her first formal report of the incident to the JIRB, and occurred more than fifteen months after the alleged misconduct, and about six months after the April 19, 1987 newspaper article. (Ross, TR at 898).

36. On October 8, 1987, two months after Justice Hutchinson's confirmation, days before his formal resignation, and only one month before Justice Larsen's scheduled retention election, an article appeared on the front page of the *Pittsburgh Post Gazette* by Bill Moushey discussing the May 30, 1986 conversation between Justice Larsen and Judge Ross, and the Zdrale land deal. The article suggested that Justice Larsen had specifically intervened with Judge Ross on behalf of Attorney Lampl and Attorney Ashton in the *Estate of Francis* case, and that Attorney Ashton and Attorney Lampl had been involved in Justice Larsen's "questionable" and "very favorable" land purchase from Mr. Zdrale at about the same time. The article indicated that Justice Larsen was suspected of impropriety, and that Judge Ross had reported the matter to the Justice Department and to "at least one official of state government." The source of the disclosures was not revealed. (*See* Moushey, "Larsen asked relief for lawyers," *Pittsburgh Post Gazette*, at 1 (October 8, 1987)).

37. Attorney Lampl testified that Mr. Moushey had told him that a member of Judge Ross' staff was his principal "informed source." At the Board hearings Mr. Moushey claimed statutory privilege and declined to reveal his sources, or to confirm or deny Mr. Lampl's assertions, even though the Board had ruled the asserted privilege inapplicable. (Lampl TR at 90, 92 & 133; Moushey TR at 1145-46, 1657-85).

38. At the hearing before this Board, Judge Ross denied having anything to do with the Moushey article, or knowing how Moushey received information concerning Justice Larsen's conversation with her, or her reports of the matter to state and federal authorities. Judge Ross noted various significant inaccuracies in the article including the assertion that Justice Larsen had mentioned Attorney Ashton and Attorney Lampl in the May 30, 1986 meeting (which she denied). She also noted that only $500,000 rather than $2,000,000 dollars (as indicated in the article) was suspected to have been improperly taken from the estate. (Ross, TR at 865-67).

39. On October 13, 1987, Judge Ross was interviewed by FBI Agents. We noted the inaccurate information in her report to the FBI regarding her conversations with Attorney Vaira and U.S. Attorney Johnson at numbers C-15, C-17, and C-20. We note that the FBI report also indicates that Judge Ross had stated, then, that her first report to the JIRB was through Mr. Keuch and not Judge Rowley as she later testified before the Board. Interestingly, in a letter to Board Counsel Keuch regarding the FBI report, she noted that the only error in the report was its reference to the person to whom she reported the incident, but she made no mention of the errors discussed *supra* at numbers C-15, C-17, and C-20. (EX R-1; EX R-1a).

40. On October 27, 1987, following publication of the Moushey article, Attorney Lampl moved to have Judge Ross recuse herself as the result of *ex parte* contacts suggested in the article. In denying the motion, Judge Ross stated:

> "The Court has no control over what newspaper writers write about a public record. The opinion expressed in the article was the opinion of the writer of the article. The article indicated that this Court, and properly so, would not comment about that case nor about the allegations concerning Justice Larsen. The court is well aware, under the Canons of Judicial Ethics, the court may not, ever, comment to any newspaper reporter about pending litigation and certainly the Homer Douglas Francis litigation. This Court has been careful to preserve the rights of all parties who appeared before it. I am sure that if the court had not been so impartial, we would have concluded these matters a long time ago. Your motion will be denied, Mr. Ashton."

(Lampl, TR at 92, 153-54; EX R-3, at 19-20).

41. At the August 1988 hearing in this matter, Judge Ross gave three reasons for her failure to recuse herself from the *Estate of Francis* matter. First, she did not consider communications between Judge Cosetti, Judge Markovitz, or Justice Larsen and herself to be "*ex parte*," because she understands (or at least understood) that term to apply only to conversa-

tions between a Judge and a party or a party's counsel. (Ross, TR at 861; *see also* EX R-3 at 3-22; EX B-10 at 4-20 . She noted further that she did not feel she had to report Justice Larsen's contact with her because that part of the case was no longer before her. (Ross, TR at 861). Finally, she testified that she felt that the JIRB secrecy provision required her to keep silent about the matter since she had reported it to the JIRB. (Ross, TR at 868-69).

42. Judge Ross also testified that she felt she was unaffected by her belief that Justice Larsen had attempted to influence her improperly on behalf of Attorney Lampl and Attorney Ashton in the *Estate of Francis* case, and further testified that she could continue to judge the outstanding matters in which Attorney Ashton continued to represent Attorney Lampl in the *Estate of Francis* case, fairly and impartially despite the fact she believed that they had worked together with Justice Larsen to influence her improperly in that case. (Ross, TR at 870).

43. Although Judge Ross had indicated her satisfaction with Attorney Lampl's accounting at a hearing on July 7, 1987, the opinion she filed in February 29, 1988, severely criticized Attorney Lampl, stating that Attorney Lampl was guilty of unethical neglect of the bankruptcy matter, contributing to the "hemorrhaging" of assets from the estate, but nonetheless made no formal findings of misconduct by Attorney Lampl. Neither the February opinion, nor the ruling on the recusal motion, were reviewed on their merits on appeal to the Superior Court. (Ex. B-9, Ex B-10, Ex B-62).

44. At the August 31, 1988 hearing, Judge Ross identified and authenticated handwritten notes which she testified that she had made contemporaneously with the events indicated in the notes beginning on May 30, 1986. (Ross, TR at 981-1001; EX R-22).

45. Judge Ross' notes do not purport to relate her conversation with Justice Larsen on May 30, 1986 in its entirety. They contain no reference to the unrelated matters she testified that she recalled she and Justice Larsen discussing, and omit reference to the follow-up call. The notation regarding her call to Attorney Vaira is squeezed in as an interlineation and incorrectly notes that she spoke with him at Cindrich's (law firm),

when in fact she had not. Both the notations regarding her calls to Attorney Vaira and U.S. Attorney Johnson merely noted the contact and neither indicated the specific content of the calls other than that they related to her conversation with Justice Larsen. The brief characterizations of those calls in her notes are also inaccurate. The notes contain no entries for her alleged contacts with Judge Cosetti or Judge Rowley. After a June 9, 1986 entry a long space is left blank with the date 11/10/86 written on the bottom of the following page with the beginning of a new entry, scribbled out. Significantly, the notes do not contain reference to the critical alleged statements, "Botula is the one" or "Go after Botula," which she testified that she recalled. The diary notes provide no corroborative support for Judge Ross's testimony; the inconsistencies noted, in fact, undermined her credibility to some extent. (EX R-22).

46. On August 31, 1988, Judge Ross testified to this Board that she "had no present desire" to go onto the Supreme Court, that she did not have a desire to go onto the Supreme Court in 1986 or 1987, and that she had decided to run in early 1988, because "the vacancy was suddenly certified" and she had "as good a chance as anyone else." (Ross, TR at 1005-06). Under cross-examination on July 10, 1989, Judge Ross conceded:

> Q. Did you contemplate a race for the Supreme Court at the time that you made known your charges or accusations against Justice Larsen, to the Judicial Inquiry and Review Board?
>
> A. First, I don't make accusations. I reported an incident to the Board which I felt was connected with the sale of the real estate.
>
> Q. I'll ask you, at the time that you reported that which had, which later resulted in the charges, I'll put it that way, did you contemplate a race for the Supreme Court?
>
> A. I don't think at that time I was thinking about it. I have always had a hankering to go to the Supreme

Court, but I don't think I had done anything that really was—

Q. All I have asked is if you had—

A. Just a latent desire, I would say, all right?

(Ross, TR at 34-35). (Emphasis added).

47. Judge Ross' testimony was challenged in the following additional respects throughout cross-examination:

a. Judge Ross testified she accepted a ride with Justice Larsen from the Pittsburgh airport in 1985, and that she could place the date based upon her recollection that Justice Larsen had suggested that she run for one of the Superior Court vacancies available in 1985. However, Justice Larsen denied ever having made such a suggestion, and Mrs. Roberts indicated that by checking Justice Larsen's calendar and files, she was fairly certain that she had given Justice Larsen and Judge Ross rides home from the Pittsburgh airport on September 19, 1984, but not in 1985. (Ross, TR at 901-02; Roberts, TR at 1403-05; Larsen, TR at 2538, 2686).

b. Judge Ross first indicated that she did not recall her conversation with Justice Larsen in the car, but was certain she would not have brought up her *Baby Girl D* adoption case which was pending in the Superior Court and virtually certain to be appealed to the Supreme Court. On further cross-examination, however, she conceded that she may have discussed work on hearings for new adoption legislation and a possible grand jury adoption investigation, but not the *Baby Girl D* case itself. (Ross, TR at 905, 920-22).

c. Judge Ross testified that Justice Larsen was dropped off first and that she was invited in to see his condominium. Justice Larsen and Mrs. Roberts denied that Judge Ross was invited into Justice

Larsen's condominium. (Ross, TR at 805; Robert, at 1403-05; Larsen, TR at 2535-39).

d. Judge Ross testified that she was dropped off downtown. Mrs. Roberts recalled that she drove Judge Ross to her home and complimented Judge Ross on her "lovely flowers along the walkway." Judge Ross denied any memory of the compliment, but did not deny the existence of the flowers Mrs. Roberts described. (Ross, TR at 805-06, 814-16; Roberts, TR at 1403-05; Larsen, TR at 2535-39).

e. Judge Ross acknowledged that she dropped off a draft adoption statute, a memorandum, and hearing testimony to Justice Larsen's chambers, but insisted that they did not relate to her "Baby Girl D" adoption case. When confronted with Mrs. Robert's statement that the papers had been marked "Baby Girl D," Judge Ross suggested that her secretary must have not known what to caption the specimen documents and must have labeled them "Baby Girl D," coincidentally. (Ross, TR at 905-20; Roberts, TR at 1405-09, 1425; EX B-41A; *In re Baby Girl D*, 512 Pa. 449, 517 A.2d 925 (1986)).

f. Judge Ross testified that she did not recall receiving a letter from Attorney Schuchert asking Judge Ross not to report Attorney Jon Botula's alleged misconduct to the Disciplinary Board. However, Judge Ross' own diary notes refer to such a letter. (Ross, TR at 991-92; EX R-22).

g. Judge Ross denied writing to Justice John P. Flaherty on September 2, 1986. When confronted with a copy of her letter, she stated that she "had a bad memory." (Ross, TR at 977-79; EX R-19).

h. When confronted with a copy of Attorney Lampl's August 18, 1988 exceptions in the *Estate of Francis* case at the August 31, 1988 Board Hearing, Judge

Ross denied she had ever received them. Her denial was contradicted, however, by her own order denying those exceptions entered on August 19, 1988, less than two weeks earlier. (Ross, TR at 969-71; EX R-17; EX R-18).

48. Based on the foregoing, we find that:

Justice Larsen, without any apparent improper motive, improperly provided Judge Ross with a prohibited *ex parte* tip concerning possible bankruptcy fraud in a case over which Judge Ross was then presiding.

IV. DISCUSSION: CHARGE I

Charge I involves an alleged improper *ex parte* communication by Justice Larsen to Judge Ross regarding the *Estate of Francis* case. In discussing the findings relating to this charge we must first determine what we know about what occurred, and then determine its legal significance.

Both Justice Larsen and Judge Ross appear to be convinced that their versions of the May 30, 1986 meeting are complete and accurate; each believes that the other's version is a willful fabrication. Neither Justice Larsen's version, nor Judge Ross' version, however, can be accepted as complete or accurate.

Each of the witnesses, the principal parties as well as the witnesses to relevant subsequent events, presented testimony demonstrably flawed by one or more of Wellman's "innocent fallacies of testimony." The witnesses' memories of relevant conversations evidenced varying degrees of deterioration and distortion as the result of their initial levels of inattention to details of the conversations, the relative insignificances of the details of the conversations at the time they occurred, the press of innumerable other weighty matters on their minds during the interim, sources of false interpolations, and the deleterious effects of the considerable period of time which elapsed between the events to be recalled and the request by this Board that the witnesses attempt to recall those events. Most of the witnesses recognized the potential for such fallacies of testi-

mony and attempted to disclose and discount for them.

United States Attorney Alan Johnson directly and forthrightly acknowledged that the press of events in his life and the passage of years had erased all independent memory of his conversation with Judge Ross by the time he testified before this Board in this matter. Judge Cosetti, Judge Rowley, and Attorney Vaira each acknowledged that they retained only the outlines of their past conversations with Judge Ross which were the focus of their testimony in this matter.

Even so, risks remain in reviewing their qualified testimony. The innocent interpolation of false references to "mob figures" and "narcotics" into Attorney Vaira's memory of his conversation with Judge Ross on June 5, 1986, in his interview with Board investigators on November 9, 1987 (which he acknowledged in his testimony to this Board), underscores the tenuous ground upon which each of these witness' testimony was founded, as well as the manifest opportunity for innocent fallacies of testimony to distort the actual facts in the witnesses' subsequent reports.

Both Justice Larsen and Judge Ross, on the other hand, claimed far more for their respective memories of the relevant events than the record before this Board could sustain. In rejecting portions of their testimony, however, we expressly reject their reciprocal invitations to find that the other is lying and committing willful perjury. To the contrary, we find that both are respected jurists with excellent reputations for honesty and integrity, who appear to be sincerely mistaken in portions of their recollections of the relevant events. We note that there is abundant cause to believe that innocent fallacies of testimony, rather than willful perjury, account for the dramatic differences in their accounts of their conversation during their May 30, 1986 meeting.

Initially we must concede that even after extensive and detailed investigation, there is no clear and convincing evidence, to establish the precise context, content, and manner of delivery of Justice Larsen's comments to Judge Ross during the May 30, 1986 meeting. Nonetheless, we find sufficient clear and convincing evidence that Justice Larsen stated something to the effect that, two men on the street had told him that in the *Estate of Francis* case, Jon Botula took all the money

and used it to buy a condominium in Florida. We reject, as an inaccurate interpolation, Judge Ross' further testimony that Justice Larsen had followed that statement with a further directive to the effect that "Botula's the one," "you go after Botula."

The reason for rejecting part of Justice Larsen's denial and part of Judge Ross' accusation is the same - neither are consistent with the available corroborative evidence from credible and disinterested witnesses. We will explain the partial rejections of Justice Larsen's and Judge Ross' testimony separately.

Justice Larsen's flat denial of any knowledge of or comment regarding the *Estate of Francis* case must be rejected, despite his excellent character for both truthfulness and integrity, because it is clearly and convincingly rebutted by the portion of Judge Ross' testimony which has been corroborated by Attorney Vaira, and United States Attorney Johnson. Both testified that Judge Ross had reported to them shortly after the May 30, 1986 meeting that Justice Larsen had provided her with a tip in the *Estate of Francis* case concerning possible bankruptcy fraud by Jon Botula. The testimony of U.S. Attorney Johnson and Attorney Vaira thus confirmed that Judge Ross had made prior partially consistent statements near the time of the May 30, 1986 meeting.

It is true that Judge Ross was the sole source for both of the corroborating witness' testimony, thus, undermining the value of their corroboration evidence in that respect, as mere repetition does not corroborate. However, we find it significant that the reports were contemporaneous with the events and both the timing and tenor of these initial reports by Judge Ross lacked even arguable political implications, as they were made far in advance of Justice Larsen's retention election, and were not in any way accusatory toward Justice Larsen. Thus, the prior partially consistent statement provides significant, albeit partial, corroboration by at least partially rebutting challenges to Judge Ross' testimony on grounds of post-event memory decay and distortion, and political bias.

Moreover, there are several reasons to believe that Justice Larsen's sincere and adamant denials of the portion of Judge Ross' account we find proved were caused by innocent fallacies in his testimony. First, a substantial lapse in time occurred

before Justice Larsen ever had cause to recall his May 30, 1986 conversation with Judge Ross (in this regard we note that U.S. Attorney Johnson found, after only a slightly longer lapse in time, that he had no independent recollection of his conversation with Judge Ross which had occurred nine days after Justice Larsen's conversation with Judge Ross). Second, if the remark was made to Judge Ross as merely a "tip" (as we find), then Justice Larsen would have had little or no reason to have been attentive to that detail during or immediately after the May 30, 1986 meeting. Hence, Justice Larsen would have no reason to recall the tip by the time accusations were raised concerning that conversation a year and one half later. Third, when the accusations were first made, the corroborated remark was lumped together with the uncorroborated and far more accusatory remarks, "Botula's the one," "you go after Botula." Having forgotten the first remark, and knowing that he had never made the other far more culpable remarks, it is not unlikely that Justice Larsen would have convinced himself that the entire allegation was patently false, though part of it was true.

In this regard, we note the following cogent observations of Francis Wellman:

> Every mind is attentive to what it sees or hears, more or less, according to circumstances. It is in the region of hazy impressions that the imagination is wont to get in its most dangerous work. It thus appears that it is partly owing to this variation in intensity of attention that different individuals get such contradictory ideas of the same occurrence or conversation. When we add to this variance in the degree of attention, the variance, just explained, in the individual interpretation or coloring of the physical sensation, we have still further explanation of why men so often differ in what they think they have seen and heard.
>
> Still another most important factor and itself the source of an enormous number of "fallacies of testimony" is memory. We are accustomed to speak of memory as if it consisted in an exact reproduction

> of past states of consciousness, yet experience is continually showing us that this reproduction is very often inexact, though the modifications which the "trace" has undergone in the interval. Sometimes the trace has been partially obliterated; and what remains may serve to give a very erroneous (because imperfect) view of the occurrence. When it is one in which our own feelings are interested, we are extremely apt to lose sight of what goes against them, so that the representation given by memory is altogether one-sided. This is continually demonstrated by the entire dissimilarity of the accounts of the same occurrence or conversation which is often given by two or more parties concerned in it, even when the matter is fresh in their minds, and they are honestly desirous of telling the truth. This diversity will usually become still more pronounced with the lapse of time, the trace becoming gradually but unconsciously modified by the habitual course of thought and feeling, so that when it is so acted upon after a lengthened interval as to bring up a reminiscence of the original occurrence, that reminiscence really represents, not the original occurrence, but the modified trace of it.

Wellman, *supra*, at 142-44. (Emphasis added). Such appears to be the case here. This potential for an innocent fallacy of testimony on Justice Larsen's part provides us with a satisfactory explanation of how the adamant denial of a man known to be truthful could nonetheless be wrong. We note that we suggest subconscious paths to those fallacies, and not conscious ones.

Judge Ross' testimony that Justice Larsen attempted to direct her decision in *Estate of Francis* by stating that "Botula's the one," "you go after Botula," likewise must be rejected because it is clearly and convincingly rebutted by the portion of Justice Larsen's denial which is corroborated by the content and tenor of Judge Ross' own initial reports of the conversation to Attorney Vaira and United States Attorney Johnson. It is also rebutted by Judge Ross' course of conduct

following the May 30, 1986 meeting including her continued courtesy toward Justice Larsen, and her failure to promptly report what would have been egregious misconduct to either the parties and her colleagues on the *Estate of Francis* case or to this Board. Had Justice Larsen actually attempted to importune Judge Ross so brazenly, we have no doubt that as an ethical jurist and as a then serving member of the JIRB, she would not have hesitated an instant in making a prompt formal complaint to this Board; her failure to do so significantly undermines her credibility on this point. Finally, it is further rebutted by the fact that her original characterization of the May 30, 1986 comments by Justice Larsen as a "tip" was not recharacterized as an attempt to influence her improperly until after she read the April 19, 1987 article suggesting misconduct by Justice Larsen regarding the Fairfield Township Land purchase, almost a full year after the May 30, 1986 meeting.

Similarly, we reject her adamant denial that Justice Larsen discussed complaints raised by Judge Zavarella and others regarding her personal and judicial conduct during the May 30, 1986 meeting. Justice Larsen's clear testimony on this point, his reputation for truthfulness, his prior similar conduct regarding other judges, and the corroborative evidence supplied by Judge Zavarella and Attorney Lampl, all combine to clearly and convincingly rebut her adamant denials.

Moreover, as with Justice Larsen, there are various avenues by which Judge Ross' testimony in this respect may have become innocently mistaken. Again, there is the deleterious effect of time. Judge Ross' contemporaneous prior partially consistent statements to United States Attorney Johnson and Attorney Vaira, indicated that Justice Larsen had provided her with a tip. Her testimony after reading the suggestive April 19, 1987 news article, however, added the alleged rejoinder "Botula's the one," "you go after Botula," which was not included in earlier reports, and which involved a fundamental change in the nature of Justice Larsen's alleged conduct. Once this false interpolation occurred, Judge Ross quite naturally would have become convinced of her duty to bring Justice Larsen to justice *via* JIRB proceedings; thus, explaining her first, belated report to this Board in October 1987, a year and one half after the May 30, 1986 conversation with Justice Larsen.

Moreover, it is likely that her status as key prosecution witness, and as a lightening rod for counteraccusations, negative aspersions, and rigorous cross-examination may have increased both her indignation and her false certainty regarding these matters.

In this regard, we note the following equally cogent observations of Francis Wellman:

> Not only does our idea of the past become inexact by the mere decay and disappearance of essential features; it becomes positively incorrect through the gradual incorporation of elements that do not properly belong to it. Sometimes it is easy to see how these extraneous ideas become imported into our mental representation of a past event. Suppose, for example, that a man has lost a valuable scarf-pin. His wife suggests that a particular servant, whose reputation does not stand too high, has stolen it. When he afterwards recalls the loss, the chances are that he will confuse the fact with the conjecture attached to it, and say he remembers that this particular servant did steal the pin. Thus the past activity of imagination serves to corrupt and partially falsify recollections that have a genuine basis of fact.
>
> Witnesses in court are almost always favorable to the party who calls them, and this feeling induces them to conceal some facts and to color others which might, in their opinion, be injurious to the side for which they give their testimony. This partisanship in the witness-box is most fatal to fair evidence; and when we add to the partisanship of the witness and similar leaning of the lawyer who is conducting the examination, it is easy to produce evidence that varies very widely from the exact truth.
>
> There is still another class of persons who would not become witnesses for either side unless they felt that some wrong or injustice had been done to one of the parties, and thus to become a witness for the injured

> party seems to them to be a vindication of the right. Such witnesses allow their feelings to become enlisted in what they believe to be a cause of righteousness, and this in turn enlists their sympathy and feelings and prompts them to color their testimony as in the case of those influenced by the other motives already spoken of.

Wellman, *supra*, at 146, 150, 152. (Emphasis added, footnotes omitted). Such appears to have been the case here; though we again in no way suggest that either post-event distortion, partisanship, or indignation played anything more than a subconscsious role in coloring her testimony.

In reaching our conclusion that part of Justice Larsen's testimony and part of Judge Ross' testimony must be rejected, we specifically reject suggestions of improper motives on the part of Justice Larsen and Judge Ross respectively. We shall deal with these suggested motives briefly.

It was suggested that Justice Larsen was motivated to attempt to influence Judge Ross in order to deflect attention from Attorney Lampl's conduct in the *Estate of Francis* case, in return for Attorney Ashton's involvement in Justice Larsen's favorable land purchase from Mr. Zdrale (whom both Attorney Ashton and Attorney Lampl had represented). We reject this suggested motivation for four reasons. First, the record reveals that Attorney Ashton, Attorney Lampl, and Judge Ross, all agree that at the time of the Fairfield Township Land deal and the May 30, 1986 meeting there was no reason to believe that there was any need for Justice Larsen, or anyone else, to intervene on Attorney Lampl's behalf. Second, under the circumstances presented, a tip implicating misconduct by Attorney Botula would have had negligible, if any, effect of exculpating Attorney Lampl, Third, Attorney Ashton initiated discussions regarding the potential sale prior to the issuance of a rule to show cause in the *Estate of Francis* case, and eventually, actively opposed the favorable land deal, specifically advising Mr. Zdrale not to go through with it. Finally, the assertion is wholly inconsistent with Justice Larsen's excellent reputation as an ethical jurist. Hence, Justice Larsen had no reason to intervene on Attorney Lampl's behalf and had nothing to

repay Attorney Ashton for doing; and, we have no reason to believe Justice Larsen would intervene improperly on Attorney Lampl's behalf, even if the motivations alleged had existed. Thus, we reject the suggestion of an improper *quid pro quo* motive for Justice Larsen to attempt to influence Judge Ross on Attorney Lampl's behalf.

It was suggested that Judge Ross was motivated to raise false charges against Justice Larsen for political gain, both by currying favor with Justice Flaherty, and by enhancing her own chances of ascending to a seat on our Supreme Court. We shall address these suggestions briefly, separately.

There is not even a scintilla of evidence to support the suggestion that Judge Ross brought charges against Justice Larsen to curry favor with Justice Flaherty. We reject that suggestion entirely.

It is true that there was a temporal overlap between Justice Hutchinson's vacancy, Justice Larsen's retention election, and Judge Ross' re-evaluation of Justice Larsen's statements in the fall of 1987, more than a year and one half after the May 30, 1986 meeting. It is also true that Judge Ross harbors an acknowledged ambition to serve as a Justice on our Supreme Court. Nonetheless, it is apparent that the April 19, 1987 news article motivated her re-assessment of the nature and import of Justice Larsen's statements on May 30, 1986, and that the imputation of a political motive is unnecessary to explain the part of her testimony which we reject.

The question, then, is whether the "tip" provided by Justice Larsen to Judge Ross on May 30, 1986 constituted misconduct which would warrant a recommendation of formal discipline to our Supreme Court. We find that such a tip violates the rule forbidding all attorneys (including judges and justices) to communicate with a judge regarding a case, outside of the presence of one or more of the parties or their attorneys, while that case is pending before that judge, and that a recommendation of discipline would seem appropriate despite the absence of any apparent improper motive for the improper *ex parte* communication.

The Respondent was charged herein with violating Canons 1, 2, and 3(A)(4) of the Code of Judicial Conduct.

Canon 1 provides:

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 provides:

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or,

knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3 provides.:

A Judge Should Perform the Duties of His Office Impartially and Diligently

A. Adjudicative Responsibilities . . .

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, must not consider *ex parte* communications concerning a pending proceeding.

Canon 1 is primarily a statement of purpose and rule of construction, rather than a separate rule of conduct. It requires that each of the other Canons be construed in accordance with the Code's fundamental purpose of ensuring both the independence and the integrity of the judiciary. To the extent Canon 1 has been construed to set forth independent rules of conduct, we find none of those rules implicated by Justice Larsen's alleged tip to Judge Ross. *See Lawyers Manual on Professional Conduct*, §2101 (ABA/BNA 1985); *cf. Sprague v. Waller*, 22 D & C 3d 564, 592 (Pa.Ct.Cm.Pl. 1982). Canon 1 is inapplicable here except in providing a gloss on the intent of the other more specific provisions.

Any perceived applicability of Canon 3(A)(4) to this case is wholly illusory. Indeed, Canon 3(A)(4) by its express terms relates to Judge Ross' duties and obligations in the scenarios set forth in the allegations. Under Canon 3(A)(4) any judge presiding in a case has an obligation not to consider *ex parte* communications such as those which Justice Larsen was alleged to have provided Judge Ross. Canon 3(A)(4) is inapplicable here.

Canon 2 is the only provision cited in the charge which applies. *Ex parte* communications with a judge regarding a case over which that judge is presiding may give rise to an appearance of impropriety which may undermine public confidence in the judiciary. Whether a communication will give rise to such improper appearances, however, will depend upon the context, content and manner of the *ex parte* communication. *See generally* Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 FRD 373, 373-89 (1984); Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 The Record 694, 694-713 (1973).

While this issue has not been addressed in any of the

published opinions our Supreme Court has issued on judicial ethics matters, it is clear that an *ex parte* communication by one member of the judiciary to another member of the judiciary may constitute censurable misconduct in Pennsylvania. In 1974, the appearance of impropriety which arose when one district justice called another district justice, asked the district justice to give a friend he identified a "fair trial," and then proceeded to offer the district justice two tickets to a Pittsburgh Steelers football game—as a "favor" to the district justice, was found to constitute censurable misconduct by our Supreme Court. *See In re Regan*, No. 36 JIRB Dkt. 1974, unreported (Pa. 1974), *digested in Judicial Discipline and Disability Digest: 1962-1978*, at 305 (Rossembaum ed. 1979).

Other jurisdictions have likewise held that an *ex parte* communication by a judge to another judge regarding a case pending before the second judge may constitute censurable judicial misconduct. *See e.g. In re Edwards*, 501 N.Y.S.2d 16, 492 N.E.2d 124 (1986)(judge publicly censured for calling Magistrate identifying self as a judge, and inquiring as to how to settle his son's traffic violation case); *Matter of Harned*, 357 N.W.2d 300 (Iowa 1984)(impulsive attempt by district justice to have another district justice dismiss her daughter's speeding ticket warrant a four day suspension, dissent would merely have reprimanded); *Matter of Murray*, 458 A.2d 116 (N.J. 1983)(municipal judge publicly reprimanded for *ex parte* communication to second municipal judge attempting to gain special treatment for former client's daughter); *Roberts v. Commission on Judicial Performance*, 661 P.2d 1064 (Cal. 1983)(trial judge's improper *ex parte* communication with an appeals court judge, and other conduct, warranted public censure); *Matter of Cunningham*, 442 N.E.2d 435 (N.Y. 1982)(trial judge's *ex parte* letter to appeals court judge warranted public censure); *Dixon v. State Com'n on Judicial Conduct* 393 N.E.2d 441 (N.Y. 1979)(district justice admonished for asking for special treatment for a friend, mitigating circumstances noted).

While all *ex parte* communications with judges regarding cases pending before those judges, may be equally prohibited, all *ex parte* communications are not equally sanctionable. Indeed, we find that there is spectrum of culpability with respect to *ex parte* communications which ranges from the plainly

criminally culpable, through the injudicious, to good faith errors, and finally to truly innocent and innocuous *ex parte* remarks. The magnitude of the misconduct will depend upon the context, content, and manner of delivery of the *ex parte* communication.

In light of the dearth of case law from our jurisdiction, we turn to cases from other jurisdictions to illustrate this continuum of culpability. We emphasize, however, that these cases are cited for illustrative purposes only.

At the highest level of culpability are *ex parte* communications for criminal or other clearly improper motives. In *Florida Bar v. McCain*, 361 So.2d 700 (Fla. 1978), a former Supreme Court Justice who had resigned under a cloud of allegations of misconduct was disbarred based upon multiple instances of misconduct while a Supreme Court Justice which included two admitted attempts to improperly influence lower court judges to rule in favor of his political/financial supporters by *ex parte* communication. One case involved an appeal by a union official from a criminal bribery conviction, the second case involved a pending petition for attorney's fees.

Justice McCain's culpability as to each of the attempts to influence lower court judges improperly were proved beyond any doubt by his own unequivocal confessions to both the conduct and the improper motives. Such is not even vaguely the case here.

We have specifically found that there was no need to attempt to influence Judge Ross on Attorney Lampl's behalf, there was no motive to attempt to influence Judge Ross on Attorney Lampl's behalf, and Justice Larsen in fact did not attempt to influence Judge Ross on Attorney Lampl's behalf. Moreover, the absence of evidence of an improper motive, and Justice Larsen's excellent reputation as an ethical jurist warrant an inference that the "tip" was what it appeared to be, *i.e.* merely a "tip," albeit a tip improperly communicated by prohibitted *ex parte* communication. Hence, *Florida Bar v. McCain, supra*, is plainly inapposite.

At the middle level of culpability stand plainly injudicious *ex parte* communications which are not made for clearly improper motives. In *In re DiLorenzo*, 330 N.Y.S.2d 394 (1972), a recommendation of removal was rejected, and public censure was

substituted as the appropriate sanction for the appearance of impropriety which arose when a judge arranged to meet and confer with counsel in charge of a Waterfront Commission investigation involving a close friend of the judge. The court found that the judge's conduct was "injudicious" in that an appearance of impropriety arose as the result of the fact that: the judge did not know the commission counsel; the judge was a friend of the target of the investigation; the judge arranged for the meeting through an intermediary; and, the judge specifically initiated a discussion of the investigation with the commission counsel. The court agreed, however, that, in light of the direct and irresolvable conflict in the evidence regarding the content and manner of the conversation, there was not clear and convincing evidence that the Judge had tried to influence the investigation improperly, as opposed to merely attempting to discover its scope and status.

In re DiLorenzo involves conduct distinguishable from that involved here. In *In re DiLorenzo*, an appearance of impropriety to a reasonable person arose from the very fact of the meeting, regardless of the contested content of their discussion. Here, the meeting itself was entirely innocuous and unobjectionable absent reference to the contested context, content, and manner of delivery of the conversation between Justice Larsen and Judge Ross; judges and justices often meet and converse on a broad range of topics, such meetings, by themselves, raise no untoward appearances.[5] Moreover, the instant

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5 We have found that although Justice Larsen provided Judge Ross with the prohibited *ex parte* tip, he also discusses with her various complaints which had been circulating regarding her personal and professional conduct. This portion of the May 30, 1986 meeting was entirely proper.

A 1966 law review on judicial discipline notes:

> It is common for judges to discuss the performance of their colleagues, particularly those within their court, and subsequently to make informal approaches aimed at curing any defect in performance. The judges spoken to are usually responsive and will often correct a fault without anything further having to be said or done. Judges on higher courts will sometimes speak to lower court judges — even in the absence of a legally recognized supervisory power.

Note, *Remedies for Judicial Misconduct and Disability, 41 NYULR 149, 167-8*

case involved an *ex parte* tip apparently made to aid a judge in ferreting out potential bankruptcy fraud in a pending case, while *In re DiLorenzo* involved, at best, an informational fishing expedition by a friend of the target of the commission attorney's investigation into possible criminal misconduct.

On the other hand, unlike *DiLorenzo*, the evidence here indicates that Justice Larsen provided factual information via the *ex parte* communication which (though presented in terms of anonymously or confidentially received hearsay information), nonetheless, was intended apparently to trigger at least further inquiry by Judge Ross. Moreover, unlike the situation in *DiLorenzo*, Justice Larsen stood in a position of authority over Judge Ross, which could exacerbate the general appearances of impropriety arising from the *ex parte* nature of the tip itself.

At the last level of culpable *ex parte* communications, are those improperly provided for unquestionably proper motives. In *In re Emmett*, 300 So.2d 435 (Ala. 1974), the Alabama Supreme Court reversed an order of censure entered against a trial court judge who had sent *ex parte* letters to appeals court judges explaining why he imposed high bail in particular cases and why he thought that they should affirm his orders. Significantly, the letters contained a statement by the judge that he had received an anonymous tip by phone that one of the defendants intended to flee the state if indicted, and had been given a financial inducement to do so. That information was plainly relevant to the merits of the bail decisions, *i.e.* the likelihood of flight. The court found that because the letter was not sent

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(1966), (Emphasis added). Richard McDevitt, former Executive Director of the JIRB, wrote in 1974:

> To date, I have gone to the Administrative Judge or President Judge and had him warn the respondent, or, better still, have one or both of the appellate Judges on our Board administer a strong warning.

McDevitt, *Judicial Disability and Removal Commissions*, 45 Pa.B.A.Q. 118, 119 (1974). While informal admonitions, without directive of the Supreme Court, may no longer be imposed by the JIRB *(See Matter of XYP, supra)*, the foregoing authorities confirm the still valid practice of judges and justices informally policing themselves. *Cf. Goodheart V. Casey, supra*, 565 A.2d at 764. *(per* Nix, C.J.; Flaherty, J., joins; McDermott, J., joins as to this issue) (colleagues have a duty to suggest recusal in some cases).

to the parties or counsel it was an *ex parte* communication, and therefore, was technically improper. However, the court found further that while the letters were technically improper *ex parte* communications, the Judge had sent them in good faith, without improper intent, and therefore censure was not appropriate under Alabama law.

Emmett too, however, is distinguishable. The improper *ex parte* communication in *Emmett* went from the trial court judge to several appeals court judges, rather than as here from a Supreme Court Justice to a trial court judge. Moreover, the *ex parte* communication in *Emmett* was contained in a letter; thus, reducing the potential for appearances of impropriety by providing a certain record of the information conveyed. Here, the tip was conveyed orally in a setting where there were no witnesses to confirm the content of the tip.

We conclude that Justice Larsen's conduct was improper, regardless of his motivation. If an appellate court judge or justice learns information he or she feels should be communicated to a trial court, it is incumbent upon the appeals court judge or justice to communicate that matter to counsel involved, or to the court *via* accepted channels of communication, *e.g.* affidavits, depositions, or testimony. *Ex parte* communication of a "tip" based on hearsay (or any other source) to a trial judge, regarding a case then pending before that judge, is prohibited.

The reason for the prohibitation of such *ex parte* communications is illustrated here. Because the tip was presented in terms of having been provided by an anonymous or confidential source, and because it was communicated *ex parte*, rather than through proper channels, the tip raised an appearance of impropriety regarding the need and/or motive for communicating the tip *ex parte*, notwithstanding Justice Larsen's excellent reputation as a truthful, ethical, and respected jurist.

The appearance of impropriety raised by the improper *ex parte* communication here, was exacerbated further by the fact that Justice Larsen stood in a position of authority over Judge Ross. The status of the party making the *ex parte* communication may affect the recipient's response, whether or not such an effect was intended.

Compelling evidence was presented regarding Justice

Larsen's excellent reputation as a truthful, ethical, and competent jurist. While this evidence sheds favorable light on the ambiguities and conflicts in the evidence presented, the fact of the improper *ex parte* tip remains.

Hence we conclude that Justice Larsen violated Canon 2 by providing a prohibited *ex parte* "tip" concerning of the *Estate of Francis* case to Judge Ross, when that case was pending before Judge Ross. We find that the conduct warrants disciplinary action despite the absence of an improper motive, because the conduct by itself raised an appearance of impropriety, which could undermine public confidence in our judiciary.

In The

Supreme Court of Pennsylvania

IN THE MATTER OF
THE HONORABLE ROLF LARSEN,
ASSOCIATE JUSTICE,
PENNSYLVANIA SUPREME COURT

No. 155
J.I.R.B. Docket

October 14, 1992

REPRIMAND

To: Justice Larsen

On this date, a per curiam order was entered in the disciplinary proceeding captioned as *In the matter of the Honorable Rolf Larsen, Associate Justice, Pennsylvania Supreme Court,* JIRB Docket Number 155. We have accepted the report and recommendation of Judge Joseph M. James, Judge Jess Juliante, Judge John T. J. Kelly, Jr., and Judge Frank J. Montemuro after an independent review of the record of the proceeding before the Judicial Inquiry and Review Board (JIRB). We have concluded that Charge I was supported by clear and convincing evidence which established that Canon 2 of the Code of Judicial Conduct was violated.

Canon 2 states that, "A judge should avoid impropriety and the appearance of impropriety in all his activities." Conduct that would not be untoward if undertaken by an ordinary citizen may subject a jurist to discipline. Indeed, the commentary to Canon 2 notes that a jurist ". . . must therefore accept

restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." It is a burden that you have borne well during your lengthy service to the Commonwealth, and it is a burden that you must accept today.

A jurist must avoid even the appearance of impropriety to champion public confidence in the integrity and impartiality of the judiciary. No improper motive has been imputed to your conduct, but because the conduct by itself created an appearance of impropriety, we must impose the sanction of this public reprimand.

TRUE COPY FROM RECORD
Attest: January 29, 1993

CHARLES W. JOHNS, ESQUIRE
Prothonotary, Supreme Court of
Pennsylvania

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, ASSOCIATE JUSTICE,
PENNSYLVANIA SUPREME COURT

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD
No. 140 JIRB Dkt. 1987
(Complaint Dkt. No. 87-156)

REPORT OF THE JIRB
TO THE SUPREME COURT OF PENNSYLVANIA

Report of:
Honorable Bruce W. Kauffman
Lawrence T. Hoyle, Jr., Esquire
Mr. James H. Higgins
Mrs. Antonia L. Scarlata

Date: July 17, 1991

PART I
IN THE MATTER OF
THE HONORABLE ROLF LARSEN

Hearing Docket Number 140

FINDINGS AND REPORT OF THE JUDICIAL INQUIRY AND REVIEW BOARD IN CONNECTION WITH BOARD MATTER NO. 140

Respondent, Rolf Larsen, is a Justice of the Supreme Court of Pennsylvania. The Judicial Inquiry and Review Board, having concluded the necessary inquiry, investigation, and formal hearing in this matter, has determined that the Respondent, Rolf Larsen, has violated the Code of Judicial Conduct and is therefore subject to discipline.

PROCEDURAL HISTORY

The instant matter involves five allegations of misconduct levelled against Associate Justice Rolf Larsen of the Pennsylvania Supreme Court.

Following preliminary investigation under JIRB Rule 1, notice of formal charges was issued on May 24, 1988, to Justice Larsen. The charges set forth two allegations of misconduct. The first charge asserted violations of Pa. Const. Art V, sec. 17(b), and Canons 1, 2, and 3(a) of the Pa. Code of Judicial Conduct with regard to an allegedly improper *ex parte* communication by Justice Larsen to Judge Eunice Ross relating to a case pending before Judge Ross at the time of the alleged communication. The second charge asserted violations of Pa. Const. Art. V, sec. 17(b), and Canons 1 and 2 of the Pennsylvania Code of Judicial Conduct with regard to his alleged pursuit of an appeal from the grant of variances to a developer for the purpose of coercing an inordinate settlement from the developer. Justice Larsen has denied both charges.

Hearings before the JIRB followed. On October 3, 1988 Amended Charges were issued alleging three additional charges of misconduct.

The first added charge, Charge III, asserted a violation of Pa. Const. Art V, sec. 17(b) and Canons 1, 2, and 3A(4) of the Pennsylvania Code of Judicial Conduct with regard to an alleged improper *ex parte* communication by Justice Larsen to Judge Emil Narick of the Allegheny Court of Common Pleas concerning a case pending before Judge Narick at the time of the alleged communication. Charge IV concerned another

alleged *ex parte* communication by Justice Larsen to Judge Narick concerning a different case pending before Judge Narick. The last added charge, Charge V, alleged violation of Pa. Const. Art V, sec. 17(b) and Canons 1, 2, and 3A(4) by attempting to influence Judge Narick's assignment of then pending cases to particular judges. On October 11, 1988, by unanimous vote of the six members then sitting, it was decided that the added charges would be redesignated as having been filed pursuant to JIRB Rule 2, rather than JIRB Rule 8 as originally indicated. All five charges were to be heard *ab initio* by a six member panel. The full Board as then composed had been reduced from nine members to six members as the result of the recusal of Judge Rowley, Judge Bonavitacola, and Judge Ross. New members, Judge Kelly, Judge Durham, and Judge Jiuliante were later appointed to the JIRB and added to the panel. Thus the panel eventually presiding in this matter included a full complement of nine members. New proceedings including motions, discovery, and hearing followed. From March 15, 1989, forward, all proceedings were conducted before a full nine member panel. The final hearing at which new evidence was presented in this matter was conducted on June 10, 1989.

Effective April 11, 1990, Board Member Judge Durham resigned. In April 1990, three Rule 9 Reports were issued by remaining Board members.

A short time thereafter, proceedings were stayed pending disposition of a special petition for an order seeking a permanent injunction barring this Board from proceeding based upon alleged procedural irregularities and recusal grounds. Relief was denied by an evenly divided Court. *Larsen v. Kauffman*, ___ Pa. ___, ___ A.2d ___ (1991) (No. 152 JIRB).

Judge Joseph M. James became a member of the Board and took Judge Durham's place in these proceedings. All transcripts, exhibits and related documents were provided for Judge James' review and analysis, including all three Rule 9 reports.

Following removal of the Supreme Court's stay, this Board conducted the required Rule 11 Hearing on May 21, 1991.

Board members Justice Kauffman, Mr. Higgins, Mrs. Scarlata, and Mr. Hoyle now submit the following Findings

and Report to the Pennsylvania Supreme Court.

FINDINGS OF FACT PERTAINING TO ALL CHARGES

1. Justice Rolf Larsen is a member of the Supreme Court of Pennsylvania first elected to his office on November 7, 1977. (Larsen 2507)

2. Respondent presented substantial character and reputation evidence concerning his reputation as a competent, truthful, hard-working member of the judiciary who is also a compassionate human being. (Exhibits R-24, R-25; Uehlein 1066-70; Lewis 1162-1173; Cindrich 1174-1183; Lightman 1221-30; Zavarella 1319-21; Bascelli 1385-87; McCommons 1387-90; Hafer 2481-84; Preate 2485-2505; Mendelson 2933)

CHARGE 1

FINDINGS OF FACT

Francis Estate

3. In September 1982, Homer Douglas Francis died. (Lampl 56)

4. At that time, Mr. Francis was in bankruptcy. (Lampl 55-56)

5. Mr. Francis was represented in the bankruptcy by attorney Robert Lampl. (Lampl 55-56)

6. After Mr. Francis' death, the bankruptcy was resolved by a sale of the remaining property in the debtor's estate to his sister and the case was dismissed. (Lampl 56-57)

7. At about this time, Mr. Francis' sister, Mrs. Vanyo, and Mr. Francis' attorney, John Botula, took out letters of administration as administrators of the estate. (Ross 796)

8. In 1983, the administration of the Francis estate was before Judge Eunice Ross. (Ross 797)

9. Judge Eunice Ross has been a judge of the Court of Common Pleas, Orphans Court Division, of Allegheny County since 1972. (Ross 795-796)

10. In July 1983, a creditor of the Francis Estate cited the estate's representatives to show cause why they should not file an account. No account was filed. (Ross 797)

11. In September 1983, Judge Ross ordered the filing of an accounting in the Francis Estate. (Ross 797)

12. Mr. Botula and Ms. Vanyo filed an account showing no receipts and no disbursements. (Ross 797)

13. In January 1985, a creditor of the Francis Estate inquired of Judge Ross's court about Lo Vol Fuels, an entity in which decedent Francis had an interest. Attorney Botula, a creditor, had taken $200,000 of Lo Vol assets owed to him without bankruptcy court approval. (Ross 797-798)

14. Judge Ross then deposed Ms. Vanyo and Mr. Botula for conflicts of interest. Ms. Vanyo had received a favorable real estate conveyance from the estate; Mr. Botula had received an improper preference in the repayment of a loan he had made to the bankrupt. The purpose of the loan was to swell the amount of assets in the bankruptcy estate so that it would look good to creditors. (Ross 798-799, 836-840)

15. Judge Ross subsequently appointed Joan Ellenbogen as administratrix pro tem to marshal the estate's assets and compel accountings by people who received assets. (Ross 798-799)

16. In 1985, Judge Ross had Mr. Lampl come to her court room to give background information on the bankruptcy case. (Lampl 57-58, 61)

17. On January 24, 1986, an order was issued in the *Francis* matter directing Attorney Lampl to show cause why he should not be required to return assets listed in the Petition for Citation filed by Administratrix Pro Tem Ellenbogen. (Exhibit B-5)

18. Mr. James Ashton represented Mr. Lampl in this matter. (R-4; R-5)

19. Mr. Ashton and Mr. Lampl have offices in the same building and associate with each other on many cases. (Ashton 180-181)

20. Mr. Ashton is a personal friend of Respondent. (Larsen 2517-2519)

21. Respondent met Mr. Ashton shortly after his reinstatement to the Bar in 1983 following his disbarment due to a felony conviction brought on by alcoholism. Respondent offered Mr. Ashton continuing kindness, support, and encouragement during his struggle to "stay on the wagon." (Ashton 246, 285-286; Larsen 2517-2520)

22. In late April, 1986, Mr. Ashton filed preliminary objections on behalf of Mr. Lampl to the Administratrix Pro Tem's petition to recover assets from Mr. Lampl in the *Francis* estate. (Exhibit B-5; Ross 800-801)

23. The preliminary objections filed by Mr. Ashton were scheduled to be heard on June 2, 1986, by the Court En Banc. (Ross 800-801)

24. On May 15, 1986, Judge Ross initiated a meeting with an F.B.I. agent and the U.S. Attorney concerning Lo Vol Fuels in which Judge Ross reported to the F.B.I. wrongdoing that she suspected from reading the *Lo Vol Fuels* bankruptcy transcript. (Ross 892-893)

25. Prior to May 29, 1986, the Court had found $500,000 missing from the Francis estate and had identified the amount received by each recipient of this money. (Ross 834-836)

26. The question to be resolved as of May 29, 1986, was whether this money had been properly utilized by its recipients, including Mr. Lampl. (Ross 836-844)

The May 30, 1986 Meeting

27. On May 29, 1986, Respondent made an appointment to see Judge Ross in her chambers. (Ross 801-804; Larsen 2536)

28. Prior to May 30, 1986, Judge Ross had never discussed the *Francis* case with Respondent. (Ross 806-811, 831)

29. On May 30, 1986, Judge Ross met with Respondent in her chambers. (Ross 806-807; Larsen 2544)

30. No one other than Judge Ross and Respondent were present at this meeting. (Ross 807)

31. In the course of the conversation which ensued, Judge Ross testified that Respondent told her, "Listen, I met two guys on the street and they told me to tell Judge Ross in the Homer Douglas Francis case that John Botula took all the money and he used it to buy a condominium in Florida." (Ross 809)

32. Judge Ross testified that she responded that this was not true; she knew about the condominium, which was only worth $15,000.00, and that there was $500,000.00 missing from the estate. (Ross 809)

33. Judge Ross testified that she listed all of the people

who had gotten money from the estate together with the amounts of money they had received; one of the names was that of Mr. Lampl. (Ross 809)

34. Mr. Botula had received $200,000 in all from the estate. (Ross 797-8)

35. Mr. Botula later settled by repaying $100,000.00 to the estate. (Ross 831-832)

36. Judge Ross testified that Respondent answered that Judge Ross was doing a good job but reiterated that she should go after John Botula. (Ross 809)

37. Judge Ross testified that Respondent then got up and left pleasantly. (Ross 810)

38. Judge Ross testified that the next day she called Respondent and asked him if the two guys on the street would come forward as witnesses in her case. (Ross 810)

39. Judge Ross testified that Respondent answered that they would not. (Ross 810)

40. Judge Ross testified that she interpreted the visit at the time as directing her to find against Mr. Botula and not the other parties regardless of the facts. (Ross 862-863, 833-836)

41. Judge Ross also testified that at the time of the May 30th visit, she felt Respondent was wrong, but did not know what motivated the visit. (Ross 871-872)

42. Respondent agrees that he initiated a meeting with Judge Ross about May 30, 1986, and that she telephoned him about the substance of that meeting shortly thereafter. (Larsen 2536, 2547)

43. However, Respondent denies Judge Ross's testimony regarding the substance of the meeting and subsequent call, stating that he had never heard of the Francis Estate until he read an October 1987, newspaper article about his alleged contact with Judge Ross about the case. (Larsen 2515)

44. Respondent testified that he in fact spoke to Judge Ross about certain negative rumors about her judicial conduct of which he thought she should be advised. (Larsen 2545-2547)

45. On or about June 5, 1986, Judge Ross called Peter Vaira, Esquire. (Vaira 1024)

46. Mr. Vaira is a former U.S. Attorney with whom Judge Ross was previously acquainted. (Vaira 1021-1023)

47. Judge Ross told him that she was handling a decedent's

estate in which there had been a question about where a substantial amount of money had gone; estate assets had been dissipated by some persons. (Vaira 1024)

48. Judge Ross told Mr. Vaira that Respondent had recently visited her and related that someone he met on the street gave him information about the dissipation of estate money by a person or persons other than the people Judge Ross originally thought were responsible. (Vaira 1024-1025)

49. Judge Ross told Mr. Vaira that the decedent in the *Francis* case had been involved in a bankruptcy prior to his death; the money that was dissipated may have been withheld or dissipated in contemplation of bankruptcy. (Vaira 1024-1026, 1034-5)

50. The new evidence, if believed, would have given Judge Ross a different view of the case. (Vaira 1025)

51. Mr. Vaira believed, from Judge Ross's communication, that Respondent's information was intended as a lead. (Vaira 1025)

52. Judge Ross asked Mr. Vaira whether the facts reported by Respondent constituted a federal violation on the part of the person identified by Respondent's informants as the culprit. (Vaira 1025)

53. Mr. Vaira responded that what was described looked like a bankruptcy fraud and he advised her to report the conversation to the then U.S. Attorney for the Western District of Pennsylvania, J. Alan Johnson. (Vaira 1026-1027; 1032)

54. Mr. Vaira believed that Judge Ross called him for two reasons — to get his advice as a lawyer with respect to an uncomfortable situation in which she had been placed because Respondent had visited her about the facts of a case pending before her and to seek advice with respect to reporting the tip about Mr. Botula's possible culpability to federal authorities. (Vaira 1037-1038)

55. By advising Judge Ross to report to Mr. Johnson, Mr. Vaira felt Judge Ross could "kill two birds with one stone" because, in addition to reporting the tip, she would have made a record of the visit in case any question ever came up about what Respondent was doing there that day. (Vaira 1026-1027, 1037-1037)

56. Judge Ross did not tell Mr. Vaira that Respondent

attempted to influence her decision. (Vaira 1039)

57. Mr. Vaira assumed Respondent had the best motives in making this communication. (Vaira 1039, 1043-1045)

58. On June 9, 1986, Judge Ross reported the visit to Mr. Johnson. (Johnson 1055, 1059)

59. Judge Ross testified that her purpose in reporting this to Mr. Johnson was not by way of a complaint against Respondent but rather as a tip regarding possible bankruptcy fraud on the part of Mr. Botula. (Ross 891-892,929)

60. Mr. Johnson's handwritten notes of this telephone call, which he adopts, state "She said she had a visit from Justice Larsen who said he got information from two people on the street that said John Botula got the money." (Johnson 1056; B- 41; B-42)

61. The memorandum stated "...Justice Larsen informed her two individuals on the street had told him that John Botula received all the money in the case in which Robert Lampl and John Botula represented the estate which is presently pending before Judge Ross." (Johnson 1056; B-41, B-42)

62. In April 1987, newspaper articles were published describing a favorable conveyance of real estate to Respondent in which Mr. Lampl and Mr. Ashton were involved. (Ross 823)

63. This land deal was consummated on or about May 27, 1986, immediately before Respondent's visit to Judge Ross. (Exhibit B-4)

64. Upon seeing the April 1987 articles, Judge Ross felt that there was a possibility that Respondent's purpose in visiting her was to deflect her from any surcharge of Mr. Lampl since Mr. Lampl and his lawyer Mr. Ashton had, according to the article, just assisted Respondent with a highly favorable business venture. (Ross 873-878; Exhibit B-5)

65. At the time of Respondent's visit on May 30, 1986, Judge Ross had not accused Mr. Ashton or Mr. Lampl of any impropriety and does not know why anyone would have cause to come see her on behalf of Mr. Lampl. (Ross 935-937)

66. Mr. Lampl testified that, as of May 30, 1986, Judge Ross' behavior to him and Mr. Ashton had been benign; she had never castigated him in any way. (Lampl 74-75, 89)

67. Judge Ross testified that, immediately after seeing an

April 19, 1987, article regarding the favorable real estate conveyance to Respondent, she decided to report Respondent's visit to Judge James Rowley, Chairman of the Judicial Inquiry and Review Board ("JIRB"), as possibly motivated by the favorable land deal described in the article. (Ross 896-897)

68. Judge Ross testified that she waited until the first time she was alone with Judge Rowley following the article to report the incident. (Ross 897)

69. On May 18, 1987, Judge Ross participated in a Board vote during a teleconference meeting of the JIRB in which the Board acted on allegations related to Respondent's Fairfield land deal. (Minutes of JIRB conference call meeting 5/18/87)

70. Judge Ross made no report of the fact, content, or presumed import of her May 30, 1986, conversation with Respondent despite the fact an April 19, 1987, article regarding the land deal was discussed by the Board during that meeting. (Minutes of JIRB conference call meeting 5/18/87)

71. During a May 26, 1987, car ride from the Harrisburg airport to the Judicial Inquiry and Review Board's office, Judge Ross described to Judge Rowley the newspaper article relating to Respondent's purchase of real estate in Westmoreland County, mentioned that Respondent had been in her chambers, and told Judge Rowley about a case that was pending before her. (Rowley 1108-1110, 1121-1124; Ross 823-824)

72. Judge Ross recalls that Judge Rowley made no response after these disclosures. (Ross 897)

73. During this car ride, Judge Rowley was very concerned about how to conduct the Board meeting that day and was somewhat preoccupied. (Rowley 1130)

74. Had Judge Ross specifically charged Respondent with misconduct during that car ride, however, it would have hit Judge Rowley "like a bolt of lighting." (Rowley 1130)

75. Judge Rowley testified positively that Judge Ross never reported to him any allegation of impropriety by Respondent. (Rowley 1112-1113)

76. Contrary to the testimony of Judge Rowley, Judge Ross testified positively that she reported the matter to Judge Rowley as Chairman of the JIRB as an impropriety on the part of Respondent in that Respondent had intervened in a case pending before her; she did not simply mention these occurrences

in a chat as a subject of general interest. (Ross 823-824)

77. Judge Ross testified that she assumed Judge Rowley would report the incident to JIRB counsel, Mr. Keuch, and that she finally contacted Mr. Keuch in September 1987, because he had never contacted her as she expected. (Ross 899-900)

78. In September 1987, four months later, Judge Ross formally reported the matter to JIRB Counsel. (Ross 894-895)

79. On or about October 13, 1987, Judge Ross met with F.B.I. agents. (R-1)

80. The written F.B.I. report of that meeting states Judge Ross told the agents that, on June 5, 1986, she had advised Mr. Vaira that Respondent was attempting to direct her to decide a case against the facts; that she asked Mr. Vaira if Respondent had committed a crime; and that she had followed up by reporting the matter to Mr. Johnson. (R-1)

81. Judge Ross subsequently wrote a cover letter to Mr. Keuch correcting one minor inaccuracy in the F.B.I. report but not noting any inaccuracy concerning its statement that Judge Ross told Mr. Vaira on June 5, 1986, that Respondent attempted to direct her to decide a case against the facts. (R-1)

82. Over one year after the visit, on July 8, 1987, Judge Ross represented on the record that she was satisfied with Mr. Lampl's explanations of his disbursement from the Francis estate, provided the attorney for the estate had no objections. (Exhibit R-5, Paragraph 8; Lampl 156-157)

Judge Ross's Credibility

83. A number of failures of Judge Ross's memory were demonstrated over the course of two days' grueling cross examination in this matter.

84. For example, Judge Ross did not recall receiving a letter from Mr. Schuchert asking Judge Ross not to report Mr. Botula's alleged misconduct to the Disciplinary Board; however, her diary notes refer to such a letter. (Ross 991-992; R-22)

85. Judge Ross incorrectly denied writing to Justice John P. [illegible]herty on September 2, 1986, about a matter unrelated to these charges. (Ross 977-979; R-19)

86. Judge Ross denied she had ever seen Mr. Lampl's August 18, 1988, exceptions filed in the *Francis* case; how-

ever, the evidence established that she had signed an order denying those exceptions less than two weeks before her testimony. (Ross 969-971; R-17; R-19)

87. Judge Ross's memory may have been mistaken on a number of peripheral matters such as the month when Respondent gave her a ride home in his car from the airport and whether Respondent's secretary, Mrs. Roberts, drove her to her home or to town on that occasion. (Compare Ross 901-902, 905-906; with Roberts 1403-1405)

88. Judge Ross also did not immediately recall what she and Respondent talked about in the car. (Ross 905, 920-922)

89. Respondent's witness, Judge Zavarella, the Administrative Judge for Judge Ross's court, recalled only minor complaints about Judge Ross and did not recall any complaints about her competence as a judge in the area of understanding the content and purport of verbal communications. (Zavarella 1340-1343, 1380-1387)

Fairfield Land Transaction

90. On February 1, 1983, Mr. Nicholai Zdrale filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the Western District of Pennsylvania. (Exhibit B-1)

91. Mr. Zdrale's scheduled assets included a parcel of approximately 36 acres of rural land in Fairfield Township, Westmoreland County, and Loyalhanna Landfill in Westmoreland County. (Exhibit B-1)

92. Mr. Zdrale owned his interest in the landfill, his own home, the Fairfield County land, a condominium in Florida, and another 20 acre piece of ground suitable for development. (Ashton 199-200; Zdrale 1237-1238)

93. Mr. Zdrale bought the Fairfield land for about $25,000 in or about 1971. (Ray 498)

94. At that time, the property had one man-made lake. (Zdrale 1269)

95. Mr. Zdrale had a second lake installed on the Fairfield property around 1979 for about $12,600.00. (Zdrale 1315-1316, 1263-1265)

96. Mr. Zdrale sold off a piece of land with a house on it

from the Fairfield parcel prior to the sale to Respondent. (Zdrale 1242)

97. In the Fall of 1985, Mr. Ashton, a personal friend of Respondent, first acquired Mr. Zdrale as a client in connection with Mr. Zdrale's antitrust case regarding the landfill property. (Ashton 180-181)

98. In the Fall of 1985, Mr. Zdrale also had serious bankruptcy problems, so Mr. Ashton brought in Mr. Lampl to handle the bankruptcy. (Ashton 180-181; Zdrale 1247-1250; Lampl 31-32)

99. On January 13, 1986, a motion to engage Mr. Lampl and Mr. Ashton as bankruptcy counsel for Mr. Zdrale was filed. (Exhibits B-1, B-4)

100. On February 13, 1986, an Order of Court was entered formally engaging Mr. Lampl and Mr. Ashton as bankruptcy counsel for Mr. Zdrale. (Lampl 51; B-4)

101. Mr. Lampl primarily represented Mr. Zdrale with respect to the bankruptcy proceedings, although Mr. Ashton did appear with him in court on several occasions. (Lampl 49-50)

102. Sometime in late September or October, 1985, Mr. Ashton's discussion with Mr. Zdrale about the sale of a tract of land in Fairfield Township began. (Ashton 199-200)

103. Mr. Zdrale testified that he had no money to fund the antitrust case, continue operation of the hearing aid center, or meet his daily living expenses, so he discussed selling some property with Mr. Ashton. (Ashton 199-200; Zdrale 1237-1238)

104. Evidence concerning the actual amounts of Mr. Zdrale's necessary expenses and income was inconclusive. (Compare Ashton 199-200; Zdrale 1237-1238; with Zdrale 1253-1254, 1260-1263, 1290-1291)

105. Mr. Zdrale testified that he had already tried to borrow money against the Fairfield land but did not succeed because of the liens on it. (Zdrale 1243)

106. Mr. Zdrale testified that he had the Fairfield land open to offers, and it was listed with realtors. (Zdrale 1239-1240, 1302-1303)

107. Mr. Zdrale never got a response. (Zdrale 1239-1240, 1302-1303)

108. In the Fall of 1985, Mr. Zdrale's former partner in the

landfill, Mr. Brunner, and the bank creditors began pushing for a liquidation in the Zdrale bankruptcy. (Ashton 207-208)

109. Mr. Ashton and Mr. Lampl began to make efforts to sell the Loyalhanna landfill in order to satisfy the bankruptcy creditors. (Ashton 207-209)

110. Mr. Ashton testified that in a chance meeting in late October 1985, Mr. Ashton mentioned the Fairfield property to Respondent because he knew Respondent was interested in rural land and the land had everything Respondent was looking for, even though it did have problems. (Ashton 203-204)

111. Respondent asked for pictures. (Ashton 203-204)

112. In November 1985, Mr. Ashton and Mr. Zdrale went to the property and took pictures for Respondent as the prospective buyer. (Ashton 304; Zdrale 1296)

113. Mr. Ashton personally showed Respondent the property sometime between Thanksgiving and Christmas. (Ashton 205-206)

114. Mr. Zdrale first became aware that Respondent and his daughter might purchase the land in late 1985. (Zdrale 1238)

115. Respondent was the only buyer Mr. Ashton brought to Mr. Zdrale. (Zdrale 1295)

116. Mr. Ashton asked Respondent to take a look at the land and make an offer, but Mr. Ashton did not specify a price for it. (Ashton 268)

117. Mr. Ashton informed Respondent that the chances were about one in ten that the liens on the property would be paid off. (Larsen 2525)

118. Respondent evaluated the property and made his offer to Mr. Zdrale. (Larsen 2525-2526)

119. Respondent formulated his offer to Mr. Zdrale by checking three plots of land nearby to see what the values were.(Larsen 2526)

120. The three plots ranged in price, the highest being $1,000.00 an acre. (Larsen 2526)

121. Respondent computed the price of land at $1,000.00 an acre to make a $35,000.00 purchase price, picked an arbitrary figure of $15,000.00 for the man-made lakes, came up with a land value of $50,000.00, and divided it by the one in ten chance in order to come up with a $5,000.00 purchase

price. (Larsen 2525-2526)

122. The Fairfield parcel was a part of the Zdrale bankruptcy estate at the time of the sale to Respondent, and the sale should have been approved by the bankruptcy court. (Cosetti 3075-3076)

123. Mr. Ashton testified that he did not realize that the Fairfield property was on the bankruptcy schedule and mistakenly handled its sale as a regular sale even though it should have been approved by the bankruptcy court, because he believed that this was a business bankruptcy involving a landfill and hearing aid business. (Ashton 218-219, 225)

124. Respondent testified that he assumed and still believes that the Fairfield plot, which was personally owned by Mr. Zdrale and his wife, would not be included in the bankruptcy estate. (Larsen 2658)

125. Respondent based his assumption on his understanding that Chapter 11 bankruptcy is for business bankruptcy whereas Chapter 13 is personal bankruptcy. (Larsen 2655)

126. Respondent knew that Mr. Zdrale's landfill business was in Chapter 11 bankruptcy. (Larsen 2521)

127. Mr. Ashton told Respondent that the Fairfield land might be cleared of its liens by the sale of the landfill. (Larsen 2525)

128. The Fairfield property was valued at $180,000.00 in the Zdrale bankruptcy schedules. (Exhibit B-1)

129. Mr. Zdrale testified that he had inflated the land value on the bankruptcy schedule so that the bankruptcy judge would be lenient with him because he had assets. (Zdrale 1304)

130. Testimony by expert witnesses for the Board and for Respondent established that the actual value of the Fairfield land as of the date of Respondent's purchase was between $21,000.00 and $39,900.00. (Ray 497; Exhibit B-22; Smith 1615-1616; R-33)

131. Respondent communicated his offer of $5,000.00 to Mr. Ashton in late 1985. (Zdrale 1242; Ashton 213-217, 221-222)

132. In late December 1985 or early January 1986, Respondent and Mr. Zdrale arrived at a "gentlemen's agreement" for Respondent's purchase of the land at $5,000.00. (Ashton 209; Zdrale 1256-1257, 1296)

133. Mr. Ashton carried the offer and acceptance messages. (Ashton 262)

134. The actual drawing up of the papers was delayed because Mr. Ashton wanted to make certain all of the liabilities were set forth in the agreement, it was holiday time, and Mr. Ashton had not been feeling well. (Ashton 209, 262-263)

135. Negotiations for the options on the Loyalhanna Landfill sale began in early to mid-January 1986. (Ashton 234-235)

136. In late January 1986, Respondent and his daughter signed Exhibit 7A, an agreement listing all encumbrances on the Fairfield Property. (Ashton 197-198, 209-210; Exhibit 7A)

137. The encumbrances listed were as follows:

Mortgages

Mortgage from Nick Zdrale and Emma K. Zdrale, to Commercial National Bank of Westmoreland County, Pennsylvania, dated December 18, 1978 in the Recorder's Office of Westmoreland County, Pennsylvania in Mortgage Book Volume 1518, page 324, securing the principal debt of $65,000.00.

Equity Actions

1. Frank R. Brunner v. Nicholai Zdrale, filed June 20, 1980 at No. 80-5355 in the Court of Common Pleas of Westmoreland County, Pennsylvania.

2. Beckwith Machinery Company v. Nick Zdrale and Frank J. Brunner, Jr., individually and as partners, n/f/t/a Loyalhanna Landfill, filed June 17, 1982 at No. 82-3731 in the Court of Common Pleas of Westmoreland County, Pennsylvania.

Pending Actions

1. Varta Batteries, Inc. d/b/a/ Power One v. Nick Zdrale, t/d/b/a Zdrale Hearing Aid Center, filed December 4, 1979 at No. 79-10387 in the Court of Common Pleas of Westmoreland County,

Pennsylvania.

2. Auditone, a division of Lear Siegler, Inc. v. Nicholas Zdrale, i/a/t/d/b/a Zdrale Hearing Aids, filed October 25, 1982 at No. 82-5112 in the Court of common Pleas of Westmoreland County, Pennsylvania.

3. Philips Hearing Aids v. Nick Zdrale, i/a/t/d/b/a Hearing Aid Center, filed November 1, 1982 at No. 82-6856 in the Court of Common Pleas of Westmoreland County, Pennsylvania.

Judgments

1. Paul R. Merich and John J. Merich v. Nick Zdrale and Frank J. Brunner, entered August 21, 1981 at No. 81-7232 in the Court of Common Pleas of Westmoreland County, Pennsylvania, in the amount of $91,506.71.

2. Equibank v. Nick Zdrale, entered August 5, 1982 at No. 82-4917 in the Court of Common Pleas of Westmoreland County, Pennsylvania, in the amount of $25,875.00.

3. Frank R. Brunner V. Nicholai Zdrale, filed June 20, 1980 at No. 80-5355 in the Court of Common Pleas of Westmoreland County, Pennsylvania, in the amount of $150,000.00.

(Exhibit B-7)

138. On February 17, 1986, a draft option to purchase Loyalhanna Landfill at $1,174,000.00, acknowledging $1,000.00 from Mr. Sidehammer in exchange for the option was prepared. (Exhibit B-2)

139. Exhibit B-2 never became effective; the $1,000.00 was never paid. (Ashton 211, 238)

140. Mr. Zdrale testified that he decided to sell the land for $5,000.00 for the following reasons: (1) the money it would take to correct problems with the man-made dams on the property and get insurance; (2) fear of a lawsuit from a possible dam

flood; (3) problems with arsonists and vandalism; (4) lack of funds; and (5) ill health. (Zdrale 1240-1244, 1246-1247, 1303-1304)

141. In February, the successful outcome of the landfill deal looked more promising than it had in the Fall to Mr. Ashton, so he advised Mr. Zdrale against taking the $5,000.00; however, Mr. Zdrale told him that he needed the $5,000.00 to live on and did not want to go back on his word. (Ashton 210-213, 263-264; Zdrale 1258-1259)

142. On February 20, 1986, Respondent's secretary, Mrs. Roberts, drew up the $5,000.00 check to Mr. Zdrale for the property. (Roberts 1415; Exhibit B-44)

143. Mrs. Roberts testified that Respondent commented, while she was drawing up the check, that getting the property would be "a longshot." (Roberts 1415-1416)

144. On February 20, 1986, the deed conveying the Fairfield property from Mr. Zdrale to Respondent was executed. (Exhibit B-7A)

145. At this time, Mr. Ashton was counsel of record for Mr. Zdrale in the bankruptcy case. (Exhibit B-1)

146. After the sale to Respondent, in February or March of 1986, Zdrale walked the ground with Respondent to show him the boundaries. (Zdrale 1242)

147. Mr. Ashton, Mr. Lampl, and Respondent all testified that neither Mr. Ashton nor Mr. Lampl had ever mentioned *Francis* to Respondent as of May 30, 1985. (Lampl 72; Ashton 281; Larsen 2515)

148. There was no evidence that Respondent knew Mr. Ashton or Mr. Lampl were involved in *Francis* before the meeting with Judge Ross on May 30, 1986.

149. On March 11, 1986, Mr. Lampl represented to the Court that he had a plan that would pay off all bankruptcy creditors which involved the sale of the Loyalhanna Landfill. (Lampl 51-52, 135-138)

150. At that time, Mr. Lampl was not sure if the pending transaction with the Westmoreland County Water Authority would go through. Mr. Lampl felt, though, that it was the beginning of a boom in the landfill business, so if this particular deal fell through another for the same money could be made. (Lampl 51-52, 135-138; Exhibit B-1 #72; Ashton 194-197)

151. On April 15, 1986, Mr. Lampl represented to Bankruptcy Judge Markovitz that an agreement had been reached with the purchaser of the landfill which would pay the creditors a significant, if not full, dividend. (Exhibit B-3; Lampl 38-41)

152. The sale referred to was the sale of the landfill to Westmoreland County for $1.4 million dollars. (Lampl 44)

153. On May 23, 1986, a hearing was held in the Zdrale bankruptcy on the motion for approval of the sale of the landfill. (Exhibit B-1)

154. An order was entered on May 27, 1986, confirming the sale of the landfill to Westmoreland County for 1.4 million dollars. The sale took place, and the funds were distributed to the various creditors as the court ordered. (Exhibit B-1; Lampl 54-55; Ashton 223)

155. Generally, the creditors in the Zdrale bankruptcy were paid 100% of their claims. (Ashton 223-224)

159. The liens on the Fairfield property were eliminated and Respondent gained clear title to the land. (Ashton 224)

DISCUSSION

We must first decide whether or not Respondent and Judge Ross did have a conversation about the *Francis* case on May 30, 1986. Respondent's denial that he could have possibly said anything about the *Francis* case and had never even heard of the case in 1986 is not credible. If Respondent's testimony were true, and in fact he had no conversation with Judge Ross regarding *Francis,* Judge Ross must then be believed to have invented this tale entirely at the time of her report to Mr. Vaira. Even supposing Judge Ross capable of inventing this story and then testifying to it under oath in order (as Respondent's counsel suggests) to enhance her chances of election to the Supreme Court, it is impossible to believe that anyone would go about a deliberate plot to bring about the removal of a Supreme Court Justice by inventing a tale containing so many unanswered questions, and the purpose of which was unclear. Second, Respondent's theory does not explain why Judge Ross would report the tale as a tip to the U. S. Attorney implicating Botula, not the Respondent, then let the matter rest for 16 months, and report the story as a possible tie-in with the

April 1987 newspaper articles — when Judge Ross could not have known in June 1986 that a newspaper article would be published in April 1987. Both the substance and the timing of outside events support the credibility of Judge Ross's recollection that Respondent came to her and made some statement concerning the *Francis* case which she reported immediately after the event to Messrs. Vaira and Johnson.

We must next decide, to the extent evidence permits, what was the content, nature, and purpose or motivation for Respondent's statements to Judge Ross concerning *Francis*. We find there is clear and convincing evidence that Judge Ross's memory of the conversation is accurate to the extent it is corroborated by Messrs. Vaira and Johnson. Thus we find that, on May 30, 1986, the Respondent met with Judge Ross and told her that two people on the street had told him that John Botula got all the money in the *Francis* estate. Mr. Johnson's contemporaneous notes and memorandum concerning Judge Ross's report confirms that this was the gravamen of the communication; further, Mr. Vaira's recollection is consistent with Mr. Johnson's evidence.

Judge Ross's reaction to Respondent's statement establishes that it was a significant tip rather than a merely casual, purposeless comment. An experienced Judge does not react to an offhand comment by reporting it to a U.S. Attorney; nor is there any evidence on the record that Judge Ross was the kind of person likely in general to overreact to a casual comment. Indeed, Respondent's witness, Judge Zavarella, administrative judge for Judge Ross's court, was exhaustively examined on the subject of complaints he himself or others had concerning Judge Ross but did not recall any such criticism of her. Further, with respect to the nature of this tip, it is significant that it troubled Judge Ross to the extent that she sought personal counsel to help her decide what to do with it, rather than simply handing it on to the FBI as she in fact had done only 2 weeks before when she reported to the FBI wrongdoing that she suspected from reading the Lo Vol Fuels bankruptcy transcript. (Ross 892- 893) Mr. Vaira confirmed that she seemed uncomfortable about receiving the tip and that she consulted him as a lawyer in addition to seeking advice regarding the proper disposition of the information she had

received. (Vaira 1026). Further, Mr. Vaira testified that, although he assumed Respondent had the best of motives in giving the tip, he himself was uncomfortable about it on his client's behalf in the sense that it is always a sensitive situation when a Judge is visited by a Justice of the Supreme Court about a case pending before a lower court judge. Mr. Vaira was concerned enough for his client to advise her to make a record of the tip and to pass it on to the U.S. Attorney in case questions later arose about what Respondent was doing that day. (Vaira 1026-8, 1038).

With respect to Judge Ross's general ability accurately to recall and interpret the May 30, 1986, conversation when she reported it to Messrs. Vaira and Johnson a few days after the event, we note that, over the course of two days' grueling cross-examination, counsel did succeed in demonstrating a number of failures of Judge Ross's memory. For instance, Judge Ross did not recall receiving a letter from Mr. Schuchert asking Judge Ross not to report Mr. Botula's alleged misconduct to the Disciplinary Board; however, her diary notes refer to such a letter. (Ross 991-92; R-22). Judge Ross also did not recall and incorrectly denied writing to Justice John P. Flaherty on September 2, 1986, about a matter unrelated to these charges. (Ross 977-79; R-19). Again, when confronted with a copy of Mr. Lampl's August 18, 1988 exceptions in the *Estate of Francis* case, Judge Ross denied she had ever received them. However, the evidence established that she had signed an order denying those exceptions less than two weeks before her testimony. (Ross 969-71; R-17; R-19). In addition, Judge Ross's memory may have been mistaken, in view of testimony by Respondent and his secretary Mrs. Roberts, on a number of peripheral matters such as the month when Respondent gave her a ride home in his car from the airport (Ross 901-2; Roberts 1483-05) and whether Mrs. Roberts drove her to her home or to town on that occasion. (Ross 905-904; Roberts 1403-1405) Judge Ross also did not immediately recall what she and Respondent talked about in the car. (Ross 905, 920-22)

We believe that such failures as these fall into the range of normal failures of memory about nonessentials. Respondent's witness, Judge Zavarella, the administrative judge for Judge Ross's court, was thoroughly examined on the subject of his

own and others' complaints about Judge Ross, but the complaints he recalled were minor; and he did not recall any complaints about her competence as a judge in the area of understanding the content and purport of verbal communications. (Zavarella 1340-1343, 1380-1387) Further, our own observation of Judge Ross's testimony in these proceedings likewise convince us that Judge Ross is a competent judge capable of understanding and passing on information correctly under ordinary circumstances.

We must next address the extent to which we may rely on Judge Ross's testimony about this conversation that is not corroborated by any independent evidence. Clearly, if all of Judge Ross's testimony were believed, and Respondent in fact made an appointment with her to urge her to surcharge one party and not other parties in a pending case before her regardless of the facts, our task would be simple. The integrity of the legal system and the protection of the rights of those who enter it rests entirely on the premise that each case be judged on the law and the facts, not the private undisclosed reasons of an individual person. For a Supreme Court Justice to abuse his position of power by privately directing a lower court judge to make a finding regardless of the facts thus would constitute one of the most flagrant possible breaches of his public trust.

However, the evidence revealed that Judge Ross's recall of critical events that occurred during a time span of one to three years prior to her testimony were irreparably colored by her later interpretations of those events. Although additional evidence of the distortion of Judge Ross's memory of past events by present interpretations of events may be inferred from the record, we believe that the following instances are of such weight that, standing alone, they establish that Judge Ross's current, uncorroborated testimony cannot in and of itself constitute clear and convincing evidence about the exact content and meaning of her conversation with Respondent.

First, Judge Ross testified several times that, at the time of the May 30, 1986 conversation, she interpreted Respondent's communication as an attempt by Respondent to intervene in the *Francis* case by directing her to find against Mr. Botula regardless of the facts and not to find against any of the other parties. (Ross 862-863, 833-836). However, her reports to

Messrs. Vaira and Johnson a few days after the conversation do not support this testimony. Although Mr. Vaira testified that he understood Judge Ross to be uncomfortable about the communication in that it is a sensitive situation when a Supreme Court Justice visits a lower court judge about the facts of a case *ex parte*, he stated that her conversation with him focussed on the lead Respondent gave and whether, if true, it would constitute bankruptcy fraud on the part of Mr. Botula. Her report to Mr. Johnson, too, raised no questions about Respondent's conduct but merely reported his tip concerning the possible culpability of Mr. Botula. If Judge Ross had perceived the message as a veiled direction to find against Botula alone, and not against the other parties, without regard to the facts, the focus of her reports to Messrs. Vaira and Johnson would have been on Respondent, not on Mr. Botula; and presumably, as a JIRB member, she would have reported the conduct to the JIRB.

Second, Judge Ross's testimony concerning the timing of her report to the JIRB after the appearance of the April 1987 newspaper article reporting the Fairfield land deal is similarly at odds with outside events. Judge Ross testified that the article suggested to her the possibility that Respondent's intent was to intervene on behalf of Mr. Lampl in return for the favorable outcome of the Fairfield land deal; and that she formed the intention to report the incident at that time. (Ross 896-897) She further testified that she felt it suitable to report the incident first to Judge Rowley alone as JIRB Chairman and that she therefore waited to report it until the first time following the appearance of the article that she was alone with Judge Rowley, during a car ride to a JIRB meeting on May 26, 1987. (Ross 897) She testified positively that she reported the occurrence to Judge Rowley as JIRB Chairman as misconduct on the part of Respondent and that she did not simply mention these occurrences in a chat as a subject of general interest. Finally, she testified that she assumed Judge Rowley would report the incident to Mr. Keuch and finally contacted Mr. Keuch in September 1987, because he had never contacted her as she expected. This recollection of her past thoughts and motivations is not persuasive.

We take official notice of the fact that Judge Ross partici-

pated in a teleconference meeting of the JIRB on May 18, 1987, in which the Board acted on allegations related to Respondent's Fairfield land deal. She made no report of the fact, content, or presumed import of her May 30, 1986 conversation with Justice Larsen despite the fact that the April 1987 article was itself discussed by the Board during that meeting. (Minutes of JIRB Conference Call Meeting 5/18/87). In spite of her purported decision to first tell Judge Rowley alone, there appears to be no compelling reason to adhere to this decision under these circumstances.

In addition, Judge Rowley, whom we find to be a credible witness, testified that, although he did recall Judge Ross describing a newspaper article about the Fairfield deal, mentioning that Respondent had been in her chambers, and talking about a case pending before her, Judge Ross never reported to him as JIRB Chairman any allegation of impropriety by Respondent (Rowley 1112-1113, 1130). Based on these facts, we find that Judge Ross did not form the intention to report these circumstances to the JIRB as misconduct on the part of the Respondent as of April, 1987, as she testified, but formed the intention some time between her talk with Judge Rowley and her actual report to Mr. Keuch in September 1987.

Third, despite testimony that she had never altered her report concerning these matters from the beginning (Ross 931), the FBI 302 notes of her October 13, 1987 report show that she told the FBI agents that she reported to Mr. Vaira about her concern that Respondent was attempting to direct her to decide a case against the facts; that she asked Mr. Vaira if Respondent had committed a crime; and that she had followed up by reporting the matter to Mr. Johnson. Judge Ross wrote a cover letter to Mr. Keuch correcting one inaccuracy in the report which did not point out this major inaccuracy. This report is evidence of yet another instance where Judge Ross's memory of her actual reports to Messrs. Vaira and Johnson, which focused on Mr. Botula, was distorted by her current interpretation of the purport of that conversation.

In sum, we find that Judge Ross's current recollection, uncorroborated by outside events, is not persuasive because it is obviously affected by an interpretation of those events which Judge Ross admittedly arrived at by looking back at the

conversation almost one year after the events actually occurred when her mind was colored by a newspaper article that accused Respondent of ethical violations involving people who had been involved with the *Francis* estate. However, evidence concerning Judge Ross's reports to Messrs. Vaira and Johnson and her behavior and reactions around the time of the May 30, 1986 conversation constitute reliable evidence concerning the contact since it predates the April 1987 article and occurred only a few days after the events in question.

Having established that Respondent privately told Judge Ross that two people on the street had told him that John Botula received all the money in *Francis*, and that it was not a casual, neutral comment but a significant tip which both Judge Ross and her attorney found troublesome in some degree, we must examine what evidence there is concerning Respondent's purpose in delivering the tip.

The motivation suggested in paragraphs 1-11 of Charge I is that Respondent was actually attempting to use his influence to repay Messrs. Ashton and Lampl for arranging a favorable transfer of property in Fairfield Township, Westmoreland County belonging to Mr. Zdrale, a bankrupt whom they represented. Board counsel, in line with testimony by Judge Ross, interprets Respondent's message as a way of discouraging Judge Ross from a surcharge of Mr. Lampl (represented by Mr. Ashton), who was one of a number of other persons who had received money from the estate and who had been served with a petition to show cause why he should not return some of those assets to the estate.

However, a careful review of the record shows that it contains no substantial evidence that the visit to Judge Ross was motivated by the successful completion of the Fairfield transaction. The only evidence to support this inference is the bare fact the visit occurred shortly after the liens on the land were satisfied. Although clear and convincing evidence establishes that, contrary to Respondent's testimony, Respondent was aware of the *Francis* case and spoke to Judge Ross to tell her that anonymous informants had advised him that Mr. Botula had gotten all the money, there is no evidence that Respondent knew Mr. Ashton had a client involved in the *Francis* estate. Further, there is no evidence that Messrs. Ashton and

Lampl had reason to believe Judge Ross would rule against them on the Petition to Show Cause. Mr. Lampl testified that as of May 30, 1989, Judge Ross's behavior to him and Mr. Ashton throughout the proceeding had been benign and that she had never castigated either of them in any way. (Lampl 74-75, 89) Indeed, Judge Ross herself testified that she had never scolded Messrs. Ashton or Lampl nor accused either of them of impropriety as of May 30, 1986, nor does she know why anyone would have had cause to come to her on behalf of Mr. Lampl (Ross 935-937); and, in fact, at a hearing in *Francis* held July 8, 1987, over one year after the alleged visit, Judge Ross represented on the record that she was satisfied with Mr. Lampl's explanations of his disbursements from the *Francis* estate provided the attorney for the estate had no objections. (Exhibit R-5, para. 8, Lampl 156-7) In addition, Respondent's information to the effect that Mr. Botula got all the money would not necessarily have any effect on Judge Ross's evaluation of the question whether Mr. Lampl had applied properly the funds he was known to have received from the estate: as Judge Ross testified, at the time of Respondent's visit, the money which the Court had identified as belonging to the estate had been traced to the recipients — the only question remaining was whether or not the recipients had properly expended the funds on behalf of the estate. (Ross 827-835)

Finally, according to Judge Ross's own testimony, her suspicion that Respondent's motive in this communication was to assist Mr. Lampl rests not on Judge Ross's belief generated at the time the events occurred, but on an interpretation of Respondent's words which Judge Ross arrived at by looking back at the conversation almost one year after the events actually occurred when her mind was colored by a newspaper article implicitly accusing Respondent of gross ethical violations.

Since there is no substantial evidence that the tip had any connection with the Fairfield transaction, and there is no other evidence of Respondent's purpose in making the communication on this record, we are left to determine whether there is a violation of Canons 1, 2, or 3(A)4 of the Code of Judicial Conduct in the fact that Respondent, as a Supreme Court Justice, came to a lower court judge and privately gave her a tip

to the effect that two anonymous people on the street had indicated the culpability of one of the parties in a case then pending before her.

Canon 1 provides:

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 provides:

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or, knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3 provides:

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

A. Adjudicative Responsibilities . . .

(4) A judge should accord to every person who is legally

interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, must not consider *ex parte* communications concerning a pending proceeding.

We find that Respondent has not violated Canon 3(A)4, since this Canon applies to the judge's duty not to *consider ex parte* communication but does not address his duty to refrain from *making* such communications. However, this Canon is applicable to the consideration of whether Canons 1 and 2 have been violated to the extent that an attempt by one judge to cause another judge to violate a Canon is clearly improper and tends to undermine the integrity and independence of the judiciary.

Although there are no reported cases with precisely similar facts, and the law relating to *ex parte* communications between judges for other than motives of personal interest is sparse and is the subject of some disagreement, we believe that an *ex parte* communication such as the one found here does violate Canons 1 and 2. Regardless of Respondent's purpose, the communication of this information was performed in a manner improper in itself and moreover fraught with the appearance of impropriety.

In the first place, it is improper *per se* for an appellate court judge to involve himself in the factual aspect of a case that may come before him by giving a lower court judge a tip in private that is on its face intended to direct the focus of factual investigation against one party in the case. If an appellate court judge makes a decision to communicate factual information concerning a case that is pending before a lower court judge to the Court, it is incumbent upon the judge to ensure that all parties are informed of the full particulars so that there is no question about the nature and content of the information.

Moreover, the appearance of impropriety on this record goes deeper than the commission of an error in judgment due to the Respondent's failure to take such steps. The message given carried improper indicia of secrecy totally inappropriate for a judge. It was conveyed as a significant tip intended, on its face, to trigger further inquiry against Mr. Botula, but the message withheld material information by attributing it to

anonymous informants without giving their names or the circumstances whereby he acquired the information. Further, the delivery of the tip, absent some kind of disclaimer about its weight, implies that the judge has reason to believe that it has at least sufficient importance to make it worthwhile to report; yet those reasons are not disclosed.

The very fact that a message is couched as a tip from anonymous informants raises questions about the identity of these informants and why the person who delivers the tip wishes to hide their identity. Is the person attempting to protect the informants, and, if so, why? Is the tip attributed to anonymous sources as a guise to convey the person's own knowledge about which he is unwilling to undergo personal questioning? Is it a way of suggesting a particular course of action to obtain a particular wished for result without taking personal responsibility for directly expressing the wish? The very fact that the tip is based on information from anonymous sources takes the communication out of the realm of the open and aboveboard because it automatically raises unanswered questions about the motives of the person who delivers the tip and where his interests lie in relation to the suggested action.

In addition, in the case before us, the impropriety that arises from the inherent ambiguity of the tip is intensified by the delicate nature of the relationship between a Supreme Court Justice and a lower court judge. First, our system of appellate review of cases is premised on the principle that lower court judges must decide cases purely on the law and the facts, undirected by *ex parte* contacts from those who will review the case on appeal. This principle is integral to the proper functioning of the appellate review process and must be protected both in actuality and in appearance. Accordingly, the use by a Supreme Court Justice of a form of communication with respect to the facts of a case that is inherently ambiguous, and thus is particularly susceptible to misuse or misunderstanding, gives rise to an appearance of impropriety in that it inevitably raises questions about whether the Justice is attempting to use a purported anonymous tip to influence the course of the proceedings. Second, a Justice has direct power over the lower court judge, not only in his review of her opinions, but also, as has been amply demonstrated on this record, with

respect to administrative appointments that may mean increased or decreased power or financial gain by the lower court judge.[1] Because the lower court judge has obvious motives to respect the Supreme Court Justice's perceived wishes with respect to the disposition of a pending case, any such ambiguous contact is especially sensitive and subject to the appearance of impropriety.

In sum, we find that Respondent has involved himself in the factual aspect of a pending case that may come before him by privately giving a tip to a lower court judge which purports to pass on information from informants whose identity he does not disclose and which directs investigation against a particular party in the case.

CONCLUSION OF LAW

The conduct at issue here violates Canons 1 and 2 of the Code of Judicial Conduct because, for the reasons discussed above, it is destructive to the goal of preserving the integrity and independence of the judiciary and fails to avoid the appearance of impropriety. In addition, this conduct violates Canons 1 and 2 in that it constitutes an attempt to cause another judge to violate Canon 3(A)4 by requesting her to consider an *ex parte* communication.

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1 *See, e.g.*, testimony of Respondent and Judge Narick regarding the practice of sponsorship of lower court judges by Supreme Court Justices for lucrative or desirable positions such as Senior Judge on Commonwealth Court or Administrative Judge. (Larsen 2732-6, Narick 2031-2033, 2038-2041)

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, ASSOCIATE JUSTICE,
PENNSYLVANIA SUPREME COURT

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD
No. 140 JIRB Dkt. 1987
(Complaint Dkt. No. 87-156)

DISSENTING AND JOINING REPORT

By Judge James M. Munley

PREFACE

All references herein contained relate to the Majority and/or Majority Report entitled "Finding and Report of the Board" filed with the Judicial Inquiry and Review Board on April 3, 1990. A copy of that Report is attached hereto. Appendix A. This Dissenting and Joining Report was written in response to that Report and was filed with the Judicial Inquiry and Review Board on April 26, 1990. It reflects my judgment of the findings relative to the state of the record and the charges filed against the Respondent, in Matter 140, at the time I served on the hearing panel.

May, 1991

Judge James M. Munley
Lackawanna County

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JIRB MATTER 140

CHARGE 1

FINDINGS OF FACT

1. The Respondent, Rolf Larsen, was elected Judge of the Allegheny Court of Common Pleas in November, 1973. He assumed the Bench in January, 1974. [T.R. - 2507].

2. In November, 1977, Respondent was elected for a full ten year term as an Associate Justice of the Pennsylvania Supreme Court. [T.R. - 2507].

3. The Respondent was retained for a second ten year term as a Pennsylvania Supreme Court Justice in November, 1987. [T.R. - 2507].

4. The Respondent is the Senior Justice of the Pennsylvania Supreme Court. [T.R. - 2507].

5. Eunice Ross is a Judge of the Court of Common Pleas of Allegheny County. [T.R. - 795].

6. Judge Ross served on the Common Pleas in Allegheny Court since 1972. [T.R. - 795, 796].

7. The Respondent and Judge Ross served as colleagues on the Common Pleas Court in Allegheny County from 1974 through January of 1978. [T.R. - 817, 2536, 2537].

8. Judge Ross at the time of the hearing in this matter sat in the Orphans Court Division, Allegheny County Courts. [T.R. - 795, 796].

9. Judge Ross was an unsuccessful candidate for the office of Supreme Court Justice in the Commonwealth of Pennsylvania, in the primary elections in the year 1988 and in the year 1989. [T.R. - Judge Ross, 6/10/89 - 34].

10. Judge Ross was appointed a member of the Judicial Inquiry and Review Board in December, 1984. She commenced her duties on the Board in January, 1985 and served in that capacity for a four year term. [T.R. - 811].

THE JUSTICE LARSEN - JUDGE ROSS MEETING

11. The Respondent on Friday, May 30, 1986 visited with Judge Ross in her chambers. [T.R. - 806, 2539].

12. Both the Respondent and Judge Ross testified that the meeting, referred to in paragraph 11, occurred and that no other person was present. Respondent stated he visited Judge Ross but, he cannot recall the specific date. [T.R. - 806, 807, 2539].

13. Before, at the time of, and after Respondent's visit to Judge Ross, one of the matters before Judge Ross was the estate of Homer Douglas Francis. Judge Ross continued to preside in the Francis matter until the summer of 1989, when the matter was finally concluded. [T.R. - 796].

14. Judge Ross testified concerning the subject matter of the May 30, 1986 conversation: that she explained to Respondent that she was at a Pitt Trustee meeting the day before, when he first telephoned her, that Respondent said he read a newspaper account of a demonstration at Pitt urging the Trustees to adopt a disinvestment resolution for South Africa and expressed the view there would be a blood bath in South Africa. She stated that Respondent mentioned a Supreme Court argument, in a case in which Judge Ross had appointed counsel and said counsel had done an excellent job at the argument, they then discussed the senior status of a judge of the Superior Court. According to Judge Ross, Respondent then said, "Listen I met two guys on the street and they told me to tell Judge Ross in the Francis matter that Jon Botula took all the money and used it to buy a condo in Florida." Judge Ross said she responded that that wasn't true, that she knew about the condo but Botula's interest was only $15,000 and there was about a half million dollars missing. In reply, Respondent pointed his finger at her and said "Your doing a good job, but Jon Botula is the one. You go after Jon Botula." Judge Ross stated Respondent then got up and left. [T.R. - 807, 808, 809, 810, 817, 818].

15. Judge Ross further testified that later the same day or possibly the following Monday, she called the Respondent and asked him if the two guys on the street would come forward as witnesses in her case. She stated that the Respondent replied that they would not do that. [T.R. - 810, 833, 986, 987].

16. Judge Ross testified she began to keep notes/diary on May 30, 1986 concerning the Francis case. Re: Respondent's visit to her chambers. [R.Ex.- 22] [T.R. - 981, 982, 988].

17. Judge Ross' record of this visit as provided in these notes does not correspond with her testimony at the Judicial Inquiry and Review Board hearing or with the formal charges filed in this matter, i.e. Respondent's words that "Botula is the one. Go after Botula." [R.Ex. - 22] [T.R. - 806, 807, 808, 809, 810, 817, 818, 989, 990, 991].

18. Despite Judge Ross' intent, the diary referred to in paragraph 16 does not contain any reference to a later phone call that Judge Ross made to Respondent, [nor numerous other significant events in this scenario according to the Judge Ross version] and which call Respondent acknowledges was made, but the content of which, however, is not agreed upon by Respondent and Judge Ross. [R.Ex. - 22] [T.R. - 988] [See Footnote #4, infra].

19. Respondent testified contrarily, that he had never heard of the Francis Estate until he read an article in the newspaper in October, 1987, three weeks before the 1987 General Election when the question of the Retention of Respondent for another ten year term on the Supreme Court was to be held. [T.R. - 2545, 2546].

20. Respondent testified that he went to see Judge Ross in her chambers over negative rumors he overheard and complaints made to him by Judge Zaverella, the Administrative Judge of Judge Ross's Division. He stated that these rumors and complaints were about Judge Ross and that the allegations concerned both her official and personal capacity. Respondent stated he told Judge Ross that these were simply rumors, that he did not come as an accuser, but only as a friend and colleague to alert her, and that she could take appropriate steps, if such were warranted. [T.R. - 2544, 2545, 2681, 2682].

21. Respondent further testified that Judge Ross called him later the same day when he got back to his office. He stated that she was distressed and wanted to know if the Respondent thought any of these persons would file charges against her in some form. Respondent reassured Judge Ross and said he did not think anyone was going to file charges against her. The Respondent denied there was any introductory remarks or small talk made on the occasion of his visit to Judge Ross' Chambers. [T.R. - 2546, 2547, 2548, 2681].

22. Respondent denied that the Francis case was mentioned by Respondent or Judge Ross, or that any conversation occurred at that time which would require Judge Ross to bring it to the attention of any counsel representing any party in any case. Respondent stated that the conversation was singular and its subject was as outlined in paragraph 20 above. [T.R. - 2545, 2546, 2548, 2681, 2682].

23. Respondent testified that Jon Botula, Esquire is a friend. When the Respondent was a practicing attorney, he rented office space from Jon Botula, Esquire and referred cases to him. Jon Botula, Esquire and his wife, have visited with the Respondent at the Respondent's condominium at the Marmont. The Respondent never had an argument or dispute with Attorney Botula that would affect their relationship. [T.R. - 2516, 2517].

24. Homer Douglas Francis, doing business as Lo-Vol Fuels, filed under Chapter 11 Bankruptcy on October 3, 1980 at No. 80-1610 in the United States Bankruptcy Court for the Western District of Pennsylvania. [Ex. - B9].

25. Attorney Lampl, counsel of record in the Lo-Vol Fuels bankruptcy proceedings has had extensive experience in the bankruptcy courts. Attorney Lampl testified that the disbursements in a bankruptcy estate are ultimately subject to court approval in the bankruptcy court. "Most Common Pleas Judges are extremely deferential to the bankruptcy process." [Ex. - B9, B10]. [T.R. - 55, 56, 70, 799, 842].

26. Jon Botula was a creditor of the Lo-Vol Fuels bankruptcy case and, in fact, had taken $200,000.00 of the assets of Lo-Vol Fuels under a loan which was not in the ordinary course of business and which had never been approved by the bankruptcy court. [T.R. - 798, 838].

27. The record revealed that Respondent, as a Justice of the Supreme Court, occasionally had contact with lower court judges. [T.R. - 2542, 2543, 2544].

28. Respondent has demonstrated an attitude of concern for members of the bench and the profession. [T.R. - 2542, 2545].

29. The testimony established that on one occasion Respondent informally contacted Judge Emil Narrick, Administrative Judge on the Civil Division, Court of Common Pleas of

Allegheny County, concerning rumors about a member of that division, Judge Marion Finkelhor. It was rumored that Judge Finkelhor was slowing up mentally and Respondent asked Judge Narrick to check it out. Judge Narrick reported back to Respondent that Judge Finkelhor was all right. The evidence at the hearing established that Judge Finkelhor took an early retirement due to her failing mental condition. [T.R. - 1894, 1895, 2542, 2543, 2627].

30. On another occasion, there was testimony regarding Judge McFalls. Rumor had it that McFalls had an alcohol problem. Respondent on this occasion contacted Judge Dauer, Administrator Judge of the Criminal Division of the Court of Common Pleas, Allegheny County and asked him to look into the matter. It later developed that Judge McFalls was arrested for driving under the influence and required rehabilitative treatment. [T.R. - 2543].

31. Respondent testified that in the case of Judge Ross he did not go to Judge Zavarella, her administrative judge, with the complaint and rumors because he knew of the difficulties between Judge Zavarella and Judge Ross in the past from Judge Zavarella's complaints to him. Judge Zavarella's testimony confirms the difficulties and problems between himself and Judge Ross. [T.R. - 1322, 1323, 1324, 2544].

32. Despite Judge Ross' complaint to the J.I.R.B. about the Respondent's May 30, 1986 visit, there is no evidence that Judge Ross ever objected to Respondent during or after their conversation. To the contrary, Judge Ross testified as to the exchange between herself and Respondent, that she fully participated in the conversation and at no time did she withdraw or discourage the Respondent. Judge Ross' testimony before the Board as to her responses to Respondent is contrary to the testimony of Mr. Vaira who stated that Judge Ross' reply was "Thank you very much." [T.R. - 809, 810, 1034].

33. The record reveals Judge Ross never complained or reported to Judge Zavarella, her administrative judge, about Respondent's conduct. [T.R. - 1322, 1323, 1324].

34. Attorney Ashton was disbarred by the Supreme Court from engaging in the practice of law and later was reinstated by the Supreme Court in the year 1983. Respondent became personally acquainted with Attorney Ashton following his

reinstatement. Respondent was a supportive friend of Attorney Ashton in the attorney's struggle with alcoholism and cancer. [T.R. - 192, 193, 2519].

35. The Monday [June 2, 1986] following the May 30, 1986 meeting between Respondent and Judge Ross, Judge Ross was one of three judges sitting on a panel on the preliminary objections of Attorney Jon Botula to a petition to compel return of certain assets in the Francis Estate. [T.R. - 812, 813, 1326, 1327].

36. At no time during the course of this proceeding on June 2, 1986 did Judge Ross communicate or suggest to Judges Schwartz and Zavarella any of the facts pertaining to Respondent's meeting in her chambers on May 30, 1986. [T.R. - 1326, 1327, 1328, 1329, 1330, 1331].

37. Attorney James Ashton was at this time representing Attorney Robert Lampl in the Francis Estate matter pending before Judge Ross [re: Petition to Show Cause why monies should not be returned to the Francis Estate]. [T.R. - 62, 63].

38. Judge Ross never acknowledged nor informed Attorney Ashton, counsel for Robert Lampl, that Respondent or any party connected with the Francis proceeding had an improper contact with her. [T.R. - 71, 72] [T.R. - Judge Ross, 6/10/89 - 25, 26, 27, 28, 29].

39. Judge Ross testified that she consulted with Peter Vaira, Esquire, a family friend and a former United States Attorney and told him of Respondent's visit to her, i.e. that someone he had met on the street had given him information about the Francis Estate's money. [T.R. - 873, 874].

40. Mr. Vaira's testimony confirmed that Judge Ross consulted him on June 5, 1986 on an attorney/client basis for advice and he told Judge Ross that the information provided by Respondent could be pertinent to a bankruptcy fraud and advised her to report the matter to Jerry Johnson, United States District Attorney for the Western District of Pennsylvania. [T.R. - 1032, 1033, 1034, 1035].

41. Mr. Vaira did not attribute anything but the best of motives to Respondent's communication as related to him by Judge Ross. [T.R. - 1045].

42. Mr. Vaira further testified that Judge Ross did not tell him that Respondent had attempted to influence her. [T.R. -

1039].

43. Mr. Vaira's testimony before the Board on August 31, 1988 as to the details provided by Judge Ross on the visit by Respondent are conflicting in light of an earlier interview with a Judicial Inquiry and Review Board Investigator where Vaira talked in terms of organized crime and drugs being the repository of the questioned funds. Vaira also stated that his memory is not good and he hoped his intervening recountings of the story would not distract readers. [R.Ex. - 23] [T.R. - 1048, 1049].

44. Mr. Vaira testified that Judge Ross consulted him on a professional matter for advice. He testified he made no notes or memorandum of his meeting two years prior. He stated Judge Ross had been to him and Johnson before on adoption frauds. Judge Ross never asked him about Respondent, only whether the information constituted a "tip" in a bankruptcy fraud. He stated Judge Ross told him she said to Respondent, "Thank you very much." He testified he did not know if Respondent expressed confidence in the information passed to Judge Ross, "I did not have enough information to make a judgment." [T.R. - 1023, 1024, 1025, 1026, 1031, 1032, 1034, 1036, 1037, 1041].

45. Judge Ross testified that she told Judge Markovitz in September, 1986 that she had offered the appointment of Administrator Pro Tem of the Francis Estate to Peter Vaira. [T.R. - 857].

46. Judge Ross testified that her purpose in reporting this matter [Judge Ross telephoned Johnson on June 9, 1986] to United States Attorney Johnson was not to lodge a complaint against Respondent but rather to provide the United States Attorney with a "tip" regarding a possible bankruptcy fraud in the Lo-Vol Fuels Matter. [T.R. - 891, 892].

47. U. S. Attorney Johnson testified that he had no independent recollection of the June 9, 1986 telephone call from Judge Ross, but that he had notes of the conversation which he adopted for his testimony to the Judicial Inquiry and Review Board. [T.R. - 1052, 1053, 1055, 1056]. [B.Ex. - 41, 42].

48. Johnson's notes revealed that Judge Ross had informed him of Respondent's visit, as well as the information he had provided her, and that she was reporting this matter to him

[Johnson] as a "tip". Mr. Johnson forwarded this information to his white collar division dealing with bankruptcy fraud. [B.Ex. - 41, 42] [T.R. - 1058].

49. Mr. Johnson's notes also revealed that Respondent told Judge Ross, he met two guys on the street. Contrary to this testimony, Mr. Vaira's recollection was that Judge Ross told him that Respondent stated he met one person on the street. [T.R. - 1024, 1025, 1043].

50. In July of 1986, Judge Ross testified that she informed Judge Joseph Cosetti, U. S. Bankruptcy Judge, of her reporting the Lo-Vol Fuels case and a portion of the Francis case [that portion related to Lo-Vol Fuels] to the F.B.I., of Respondent's visit to her and relayed to him Respondent's alleged comments regarding the Francis Estate and Lo-Vol Fuels. [T.R. - 859, 860].

51. By way of stipulation, Judge Cosetti contradicts Judge Ross. The stipulation reads as follows:

> "It is hereby stipulated and agreed among the parties that Judge Joseph P. Cosetti of the Bankruptcy Court of the Western District of Pennsylvania, if called to testify, would testify that he had a number of telephone conversations with Judge Ross in 1986 and 1987. That the substance of those conversations was the handling of the Lo-Vol Fuels case in the Bankruptcy Court and how it impacted on the Homer Douglas Francis Estate before Judge Ross. He would also testify that he does not remember Judge Ross telling him that Justice Larsen had intervened with her on the Francis estate and that fact, if clearly communicated to him, would be so unusual that he would probably remember it." [T.R. - Judge Ross, 6/10/89 - 132, 133].

52. On December 12, 1986 the Pennsylvania AFL-CIO honored the Respondent and presented him with their Judicial Excellence Award. [T.R. - 1066, 1067, 1068, 1069, 1070]. [R.Ex. - 24].

53. In connection with this occasion, the Respondent, on November 25, 1986, received a personal letter from Judge Ross which stated,

> "Dear Justice Larsen: I was pleased to send a contribution of $50.00 to the labor tribute dinner in your honor. I cannot attend because I recently had my arm and hand operated on for severed tendons. I hope the dinner is a success. Happy Thanksgiving. Sincerely yours, "Eunice" (written) "Eunice Ross" (typed).

[R.Ex. - 20] [T.R. - 979, 980, 981, 2552].

54. On March 26, 1987 Respondent and Judge Ross both attended the wake of Judge Watson's mother. While both were present on this occasion, expressing sympathies to Judge Watson, they sat together and conversed in a cordial fashion. [T.R. - 2550].

55. On this later occasion the subject of the AFNA Dinner in Philadelphia became one of the focal points of the conversation and that Mrs. Anwar Sadat was to be the featured speaker. Respondent was attending the dinner and was to be seated at the dais. Judge Ross while attending was expecting to be seated in the audience. Judge Ross expressed a desire to sit on the dais and asked Respondent if he could arrange it. Respondent called a party connected with the dinner committee and arranged for Judge Ross' seat to be moved to the dais. [T.R. - 979, 980, 2550, 2551].

56. On April 19, 1987 the *Greensburg Tribune Review* published an article suggesting a favorable real estate transaction involving Respondent, James Ashton, Esquire and Robert Lampl, Esquire which had taken place in February, 1986. [T.R. - 823].

57. Judge Ross testified that after reading the newspaper article's [The *Greensburg Tribune Review* edition, April 19, 1987] allegations, she recalled Respondent's visit to her, the Lampl matter before her in the Francis Estate, and assumed the real estate transaction in Fairfield Township suggested the possibility of improper behavior on the part of Respondent. [T.R. - 823].

58. The minutes of the J.I.R.B. conference call, May 18, 1987 establish a matter concerning newspaper allegations of Respondent's conduct was discussed and acted upon. The articles alleged that Respondent purchased land under favorable financial conditions and the Board unanimously adopted a motion directing a letter of inquiry concerning the allegations be sent to Respondent. Judge Ross actively participated in this conference call. [5/18/87 - Minutes of J.I.R.B. Conference Call].

59. On May 26, 1987 Judge Ross testified that she made an official report to Judge James Rowley, Chairman of the Judicial Inquiry and Review Board while en route from the Harrisburg Airport to the Judicial Inquiry and Review Board's headquarters in Harrisburg concerning Respondent's visit to her and her belief that he had sought to intervene improperly in the Francis Estate matter. [T.R. - 822, 823, 824, 830, 832].

60. Judge Rowley testified at the hearing before the panel on September 1, 1988 that Judge Ross, while she did indicate that the Respondent had been in her chambers, never said anything which in any way indicated that there had been an improper contact between her and the Respondent. [T.R. - 1112].

61. Judge Rowley further testified that had Judge Ross indicated there was some impropriety on the part of the Respondent in his visit, he would have advised her to report it to the Board, and he would have reported it also. [T.R. - 1112, 1113].

62. Judge Rowley testified that Judge Ross never reported to him in his capacity as Chairman of the Judicial Inquiry and Review Board any allegation of impropriety on the part of Respondent. [T.R. - 1112, 1114].

63. On September 9, 1987, having had no response from the Judicial Inquiry and Review Board concerning the charges she had made to Judge Rowley on May 26, 1987, Judge Ross contacted the Judicial Inquiry and Review Board's Chief Counsel, Robert Keuch and reported on Respondent's visit to her sixteen months prior and the statements made by Respondent at that time. [R.Ex. - IA] [T.R. - 894, 895].

64. On October 8, 1987 the *Pittsburgh Post Gazette* ran a front page story that criticized Respondent, stating "Larsen went to see a judge [Ross] in a probate case on behalf of two

lawyers [Ashton and Lampl] with whom he had been involved earlier in a deal that enabled him and his daughter to buy . . ." property for a fraction of its value. The featured headline of that special report was, "Larsen Asked Relief For Lawyers". The account went on in detail stating, "[w]hen Larsen came to see Ross, he told her Lampl and Ashton were good men and had done nothing wrong in her court. He asked her not to be hard on them." [R.Ex. - 2].

65. Attorneys Ashton and Lampl subsequently presented a motion for recusal to Judge Ross in the Homer Douglas Francis Estate as a result of the article's allegations. [T.R. - 92, 152, 153, 154].

66. Judge Ross in denying the motion to recuse stated,

> "The court has no control over what newspaper writers write about a public record. The opinion expressed in the article was the opinion of the writer of the article. The article indicated that this court, and properly so, would not comment about that case nor about the allegations concerning Justice Larsen. The court is well aware, under the Canons of Judicial Ethics, the court may not, ever, comment to any newspaper reporter about pending litigation and certainly Homer Douglas Francis litigation. This court has been careful to preserve the rights of all parties who appeared before it. I am sure that if the court had not been so impartial, we would have concluded these matters a long time ago. Your motion will be denied, Mr. Ashton."

[R.Ex. - 5] [T.R. - Judge Ross 6/10/89 - 25-33] [T.R. - 153, 154, 937, 938].

67. Thereafter Attorney Ashton filed subsequent petitions with Judge Ross asking that she reconsider the attorney's Motion to Recuse. These motions were also denied by Judge Ross. [T.R. - 23, 24, 25, 26, 951, 952, 953, 954].

68. The F.B.I. maintained an ongoing investigation of the Lo-Vol Fuels bankruptcy matter. [T.R. - 851].

69. Judge Ross reported to the F.B.I. on October 13, 1987 that she went to Attorney Vaira regarding Respondent's visit

because she believed that Respondent was attempting to influence her decision in a case before her. [T.R. - 810, 894-896, 900, 933] [See Footnotes #5, #8, infra]. [R.Ex. - 1B, 1C].

70. Judge Ross was initially interviewed by the Judicial Inquiry and Review Board concerning these allegations against Respondent on December 10, 1987. [T.R. - 975, 976, 977].

71. Judge Ross testified at the J.I.R.B. hearing that contrary to newspaper reports the Respondent did not go to see her on behalf of two lawyers and did not ask for relief for any lawyers. [T. R. - 866].

72. Judge Ross testified that during the pendency of the Francis estate, she had never accused James Ashton and Robert Lampl of any impropriety and had no idea why anyone would feel intervention on behalf of the two attorneys was necessary. [T.R. - 936, 937].

The Fairfield Township Thirty-Six Acres

73. Attorney James Ashton, in the fall of 1985, commenced to represent Nikolai Zdrale in an anti-trust matter. [T.R. - 181].

74. Mr. Ashton's client Nikolai Zdrale had serious financial difficulties and had initiated a business bankruptcy proceeding. [T.R. - 181].

75. Attorney Ashton referred Mr. Zdrale to Attorney Robert Lampl for purposes of representing Mr. Zdrale in the bankruptcy. [T.R. - 181].

76. Attorney Robert Lampl is a lawyer engaged in the practice of law in the city of Pittsburgh. Mr. Lampl and Mr. Ashton have offices in the same office building. Attorney Lampl testified that the emphasis of his practice is commercial transactions. [T.R. - 31, 32].

77. Attorney Ashton learned that Mr. Zdrale owned a tract of rural land consisting of 36 acres in Fairfield Township, Westmoreland County which Mr. Zdrale wanted to sell because of his financial circumstances. [T.R. - 1237, 1238, 1239].

78. Mr. Zdrale had advertised the property for sale previously, through a realtor, without success. He also testified he was unable to borrow money against that property. [T.R. - 1240, 1243, 1291, 1292, 1293].

79. The condition of the Fairfield property and dams occupying the thirty-six acre tract were in disrepair. Zdrale said he was additionally concerned because he had no liability insurance covering this property. [T.R. - 1240, 1241].

80. Mr. Ashton stated he believed, mistakenly, that Zdrale's bankruptcy involved only Zdrale's business, a landfill in Westmoreland County, which was bogged down in a mire of legal entanglements with Zdrale's partner, Louis Tassone. [T.R. - 137, 138, 218, 219].

81. Louis Tassone, owned 100% of the voting stock in the landfill operation called Loyalhanna Landfill. Zdrale, under the corporate structure, was not a member of the Board of Directors of Loyalhanna, and had no say in its management. While the landfill operation continued Zdrale received no compensation nor did he have any discretion regarding the landfill operation. At this point, destitute, ill and very disappointed, Zdrale filed bankruptcy. [T.R. - 105, 106, 137, 138, 1293].

82. Attorney Ashton had the thirty-six acre tract appraised by a real estate appraiser, Alan Paterson, who felt that in light of the property's condition, frequency of arsons in the area, and state of disrepair of its lakes and dams, the property could be valued at no more than $30,000.00. [T.R. - 202, 203, 204].

83. Glen Ray, called as a Board witness, testified to the fact that Respondent had contacted him, as early as 1983, for the expressed purpose of purchasing rural land. Specifically, Respondent was interested in undeveloped rural land. [T.R. - 508, 509, 510].

84. In late October, 1985, Ashton testified he mentioned the thirty-six acre tract to Respondent because he knew Respondent had an interest in purchasing rural land. Mr. Ashton told Respondent of the liens and said there was a one in ten chance that Zdrale's financial condition would be resolved and the liens cleared either by the sale of the landfill or Zdrale's success with his anti-trust claim. [T.R. - 204, 206, 2523, 2524, 2525].

85. The testimony established that there was no zoning available in Fairfield Township, and that the property had no utilities except for electricity; there were no sewers; no police protection, except state police; and no fire protection. The area was plagued by a considerable number of fires attributed to arsonists who principally victimized the properties of absentee

owners. [T.R. - 203, 1607, 1619, 1620, 2530].

86. Despite the circumstances described above Respondent was interested in the property and he and his daughter purchased it on February 20, 1986. [B.Ex. - 7A, 7B] [T.R. - 2524, 2525, 2526, 2527, 2651, 2652].

87. Ashton testified that he asked Respondent to take a look at the land and make an offer. Respondent stated he developed his offer by checking the prevailing prices for land in the area and using the one in ten chance formula he offered $5,000.00 which was accepted by Mr. Zdrale in late 1985, with a closing held on February 20, 1986. Mr. Smith, realtor, testified that the market value of the property was $21,000.00 to $24,000.00. Mr. Ray, realtor, testified the market value of the property was $42,000.00. [B.Ex. - 22] [T.R. - 496, 1615, 1616, 1617, 2525, 2526].

88. Respondent testified that he believed that the thirty-six acre tract was personally owned by Mr. and Mrs. Zdrale, and that it was not involved in the Chapter 11 Bankruptcy. Respondent testified he distinguished such a proceeding from a Chapter 13 Bankruptcy, for personal bankrupts and therefore gave no further thought to the bankruptcy aspect, thinking it was beyond the parameter of a Chapter 11 proceeding. Respondent testified he has no expertise in bankruptcy matters. He stated that he did not have a title search made of the property before its purchase. [T.R. - 2521, 2643, 2644, 2646].

89. At the time of the transaction between Zdrale and Respondent, they did not know each other. The only time they met was after the sale was completed. [T.R. - 1241, 2521, 2522].

90. On May 23, 1986, the Bankruptcy Court approved the sale of the landfill to the Westmoreland County Sanitary Authority. On May 28, 1986, the closing on the sale of the landfill took place, all instruments transferring the property were executed by the parties. All creditors were paid one hundred cents on the dollar. Mr. Zdrale realized over $400,000.00 from the transaction. As a result of the landfill sale, all liens on the thirty-six acre tract purchased by Respondent in Fairfield Township were satisfied. [T.R. - 239, 240].

DISCUSSION

Charge One centers around a visit by Respondent to Judge Ross' Chambers on or about May 30, 1986.

No person other than Respondent and Judge Ross was present at the meeting on that date. The conversation was not recorded in any fashion.

The Respondent and Judge Ross testified extensively before the Judicial Inquiry and Review Board[1] about the content of their conversation at this meeting. Judge Ross testified on Tuesday, August 30, 1988 and Wednesday, August 31, 1988, [T.R. - 795-1007] and on Saturday, June 10, 1989. [T.R. - 23-76]. The Respondent testified on Wednesday, April 19, 1989 and Thursday, April 20, 1989. [T.R. - 2506-2926].

The record is voluminous, consisting of approximately thirty-five hundred pages of testimony and includes the examination of forty-six witnesses and over one hundred exhibits.

Judge Ross' testimony about the visit by Respondent to her

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1 The Judicial Inquiry and Review Board, hereinafter referred to as the same, the J.I.R.B. or the Board. The J.I.R.B. is a constitutionally created body vested with the responsibility of keeping informed on all matters relating to grounds for suspension, removal and discipline of all members of the judiciary in the Commonwealth. Pa. Const. Art. V. §18. Article V, §18 further provides that where the Board finds good cause it shall recommend to the Supreme Court an appropriate sanction or discipline for the dereliction it has found to have occurred. This is the exclusive method available for judging perceived violations of the Code of Judicial Conduct and as succinctly stated in the case of *Reilly V. Septa,* 489 A.2d 1291, at 1299 (1985),

> . . . The consititution provides a mechanism for the enforcement of violations of the Code of Judicial Conduct and the Judicial Inquiry and Review Board is authorized, on its own volition, where necessary, to investigate violations of the Code of Judicial Conduct (see Rule 1—Rules of Procedure Governing the Judicial Inquiry and Review Board), . . . *This procedure, except for impeachment proceedings, is the exclusive mode established for the discipline of our judges for violations of the Code* and we have not abdicated or delegated any of our supervisory authority in enforcing these standards of conduct to Superior Court. To presume that the Code or its alleged violations can be reviewed by any tribunal other than those we authorize is a misapprehension of the purpose of the Code, and is seen as an impermissible meddling into the administrative and supervisory functions of this Court over the entire judiciary. (Emphasis added)

chambers was that she and Respondent engaged in some friendly small talk, and then Respondent said to her, "I met two guys on the street and they told me to tell Judge Ross in the Homer Douglas Francis Estate that Jon Botula took all the money and used it to buy a condo in Florida." [T.R. - 809]. Judge Ross said she stated to Respondent, ". . . that's not true, Rolf, . . . I know about the condominium and . . . his (Botula) interest in it was only worth $15,000.00 and we were talking about a half million dollars . . . being missing." [T.R. - 809]. She said she named the people who got money and then Respondent said ". . . You are doing a good job but . . . Botula is the one. You go after Botula." [T.R. - 809]. She then stated Respondent "got up and left [her chambers] very pleasantly". According to Judge Ross, that day or the following Monday, she telephoned Respondent and asked him if the "two guys" on the street would come forward as witnesses in the case, and Respondent replied, "[t]hey wouldn't do that". [T.R. - 810].

Respondent denied Judge Ross' account of the visit. According to Respondent he never heard of the Francis Estate until the *Pittsburgh Post Gazette* front page special report on October 8, 1987. Respondent stated that on or about May 30, 1986 he went to see Judge Ross in her chambers. He categorically denied any judicial impropriety and insisted that the impetus for approaching Judge Ross was as a friend and colleague, to alert her to some judicial and personal criticism he had heard about her. [T.R. - 2545]. Respondent testified that he thought it was fair that she should know a number of persons were talking or complaining about certain matters. He described Judge Ross as being upset when she telephoned him later that same day wanting to know if Respondent thought any one of the complaintants would file charges against her. Respondent testified that during the telephone conversation he assured her he did not feel anyone was going to file any charges against her. [T.R. - 2548]. In Respondent's testimony he denied that there was any chit-chatting or preliminary conversation held between the parties during the May 30th meeting. [T.R. - 2681, 2684]. He stated he made no remarks about the Francis Estate and made no statements involving parties, lawyers or any matters that would warrant Judge Ross

bringing the subject of their conversation to someone else's attention. Respondent further testified that from May 30, 1986, to the time of his testimony before the J.I.R.B. he never held any discussions regarding the Francis Estate with Judge Ross despite the fact that he was in her company on a number of occasions. [T.R. - 2538-2550].

The standard of proof in proceedings on formal charges before the J.I.R.B. is that the charges must be established by clear and convincing evidence. *In the Matter of Braig*, 554 A.2d 493, at 495, (1989) the Supreme Court of Pennsylvania stated that "the standard of clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of truth of the precise facts in issue." (citations omitted).

It is an undisputed fact that a meeting between Respondent and Judge Ross took place on or about May 30, 1986. The testimony of Respondent and Judge Ross are in conflict with respect to the substance of their conversation. Judge Ross in testifying that the May 30th visit of Respondent to her in chambers was for the purpose of discussing the Botula matter in the Francis Estate, stated that she did not interpret this visit as an attempt to influence her judgment and that Respondent's conversation was not a matter that she felt was reportable to the Board. [T.R. - 863, 871, 872, 879, 881].

Judge Ross,[2] as a member of the Judicial Inquiry and Review Board, more than the ordinary judge is fully conversant with

2 Judge Ross is a graduate of the University of Pittsburgh Law School. She has served as a law clerk in the Court of Common Pleas of Allegheny County and was engaged in the practice of law from 1952 to 1970. She has been a law school professor and authored a number of legal articles. She is a member of the Board of Trustees of the University of Pittsburgh, and has contributed to the modernization of statutes in the Commonwealth in the area of adoptions. Judge Ross was appointed Judge of the Court of Common Pleas of Allegheny County in December, 1972, and was subsequently elected to a ten year term. She was later retained for a second ten year term by the electorate in Allegheny County. Judge Ross has been a candidate for the office of Justice of the Supreme Court in the years 1988 and 1989. Judge Ross was appointed by the Supreme Court of Pennsylvania to the J.I.R.B. for a four year term commencing January, 1985.

and knowledgeable of the role of the J.I.R.B.[3] and the fact that it is a creature encompassing the Judiciary and Judicial procedure [known in practice as the "Judicial Code"] and that the Board was conceived as the vehicle to supervise the conduct of all members of the judiciary. Members of the Board as a consequence are fully conversant with the Canons of Judicial Ethics and apply the standards on a regular basis. It is their responsibility to refer in appropriate instances findings and recommended sanctions for errant judicial behavior to the Supreme Court of Pennsylvania. Judge Ross has, since her appointment to the J.I.R.B., been involved in a wide variety of cases involving the Canons of Judicial Conduct. Therefore, we are of the opinion that Judge Ross can be viewed as highly proficient in matters relating to judicial behavior and the Canons of Judicial Ethics.

Consequently, a review of the actions of Judge Ross at the time of and subsequent to the May 30, 1986 visit by Respondent and her testimony before the Board is vital to our determination of the charges at hand against the Respondent.

According to Judge Ross' testimony, she "was stunned" and "tongue-tied" following her conversation with Respondent. [T.R. - 833]. Yet she told no one of the meeting with Respondent and made no contemporaneous note of the event.[4] Query:

3 The Judicial Inquiry and Review Board is provided for in the Pennsylvania Constitution, supra. and Title 42 of the Pennsylvania Consolidated Statutes, 42 Pa. C.S. §2101-2105, §3331-3334.

4 Judge Ross testified that shortly after the encounter with Respondent she decided to keep a diary, for purposes of aiding her in recollecting the events concerning Respondent's visit and the Francis Estate. (T.R. - 997). The diary constitutes a single page of Judge Ross' handwritten notes. (R.Ex. - 22). It is evident on a close examination of this document that it varies from the record in that: 1). The words employed vary significantly from the language of Charge 1 and the testimony elicited at the trial. (Charge 1, T.R. - 988, 990. 2). It omits a telephone call Judge Ross made to Respondent which is a matter of great significance in this scenario. 3). Judge Ross testified during trial that she forgot to include a significant detail, her meeting with Mr. Vaira, and she stated at some later time (undetermined) she recalled the Vaira meeting and went back and squeezed that notation in the diary. (T.R. - 996). 4). It fails to mention the June 2, 1986, court en banc proceeding, re: Francis Estate and Botula's preliminary objections. 5). It neglects to specify the discussion she had with Judge Cosetti. 6). It does not cite the newspaper article of April 19, 1987. 7). It makes no mention of her meeting and report to Judge James Rowley on May 26, 1987. Due to the inaccuracies and inadequacies of this diary it contributes little to enlightening us as to Respondent's visit and therefore we give it little or no weight.

Why, if Judge Ross was disturbed by Respondent's visit and suspected or thought that he might be in violation of the Canons as a result of the remarks he made at the time of the visit, did she not seek to discuss this matter with the proper authorities, i.e. the J.I.R.B. "as the exclusive mode established for the discipline of . . . judges for violations of the Code . . ."? *Reilly, supra.* On the Monday following the May 30th meeting, (June 2, 1986), Judge Ross sat on a three-judge panel, en banc, with Judge Zavarella and Judge Schwartz, a panel which was entertaining arguments on Jon Botula's preliminary objection filed in the Francis Estate. If Judge Ross had concern about a violation of the Judicial Canons by Respondent with regard to the Francis Estate, one would expect, at the very least, that she would have discussed a concern of this magnitude with some other authority or jurist immediately, especially fellow judges who together with her, were sitting on the Francis Estate.

It has been suggested that if she were to confer with the other jurists it would constitute polluting the panel. However, a judge is obliged to share such information, for if a judge is compromised, and thus polluted, the entire en banc panel in this instance [even without sharing the information] would, in fact, be polluted. In any event, Judge Ross did not discuss this matter with anyone until she met with Peter Vaira on June 5, 1986. Her inaction from May 30 to June 5, 1986 suggests that she did not regard Respondent's conduct as a clear and definite violation of the Canons.

On June 5, 1986 approximately a week after the meeting with Respondent, Judge Ross contacted Attorney Peter Vaira and Attorney Jerry Johnson, people who could best be described as having law enforcement credentials. Mr. Vaira is the former U. S. Attorney for the Eastern District of Pennsylvania and Mr. Johnson is the present U. S. Attorney for the Western District of Pennsylvania. Judge Ross testified that the circumstances of Respondent's visit to her and the information he conveyed were such that she felt the need to consult with counsel. [T.R.- 951]. However, the questions she put to them concerning her meeting with Respondent, and as described in their testimony, centered around whether or not a crime was committed, in particular a bankruptcy fraud

[Lo-Vol Fuels]. Mr. Vaira testified that at no time during these contacts did Judge Ross raise any question of Respondent's impropriety. [T.R. - 1039, 1058]. Mr. Vaira stated that the essence of Judge Ross' conversation with Respondent concerned a bankruptcy matter that perhaps constituted bankruptcy fraud and that he advised her to report Respondent's information to U. S. Attorney Jerry Johnson. Mr. Vaira further stated that he presumed that Respondent had the "best of motives and was not good at these kind of things"[5] [T.R. - 1026, 1032, 1045]. Attorney Johnson stated he had no independent recollection of details of the telephone call from Judge Ross and adopted his note. [B.Ex. - 41]. He stated he directed Judge Ross' information to his white collar crime division, dealing with bankruptcy. [T.R. - 1058]. Judge Ross stated she consulted with her attorney, Peter Vaira, and her actions were taken in reliance on his advice. [T.R. - 873]. She said she needed help in making a decision about what to do [T.R. - 874], but that she agreed with Mr. Vaira that the incident was not reportable to the J.I.R.B.. [T.R. - 878]. Thus, Judge Ross turned to criminal prosecutors for advice because, as reflected in her testimony, she believed she was giving them information, a "tip" or a "lead", in the Lo-Vol Fuels bankruptcy matter. [T.R. - 891, 892, 894, 1025, 1058].

We believe that if Judge Ross were compromised by Respondent or if he had attempted to importune her in any fashion, given her stature, she would have immediately reported it to the J.I.R.B. or, at the very least, brought it to the attention of her fellow judges when she sat with them the Monday following the May 30th meeting [seventy-two hours later] on a panel convened to consider Jon Botula's petition in the Francis Estate.

Moreover, and perhaps more telling is Judge Ross' own statement made more than one year after the May 30, 1986

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5 Judge Ross' report to the F.B.I. on 10/13/87, seventeen months later, varies in its details. She told the F.B.I. she had reported to Mr. Vaira that Respondent directed her to decide a case a certain way contrary to her own belief. (Compare R.Ex. - 1A at pg. 2, 10/13/87 and T.R. 1039, 1040). Mr. Vaira contradicts his testimony at trial in his official report to the Board (11/9/87) wherein he stated that the money went to the mob or was used to purchase narcotics. (Compare R.Ex. - 23 and T.R. - 1025, 1046-1049).

visit of Respondent at the time that she denied Attorney Ashton's motion to recuse. [Hearing on motions to recuse held before Judge Ross, October 27, 1987].

> "The court has no control over what newspaper writers write about a public record. The opinion expressed in the article was the opinion of the writer of the article. The article indicated that this court, and properly so, would not comment about that case nor about the allegations concerning Justice Larsen. The court is well aware, under the Canons of Judicial Ethics, the court may not, ever, comment to any newspaper reporter about pending litigation and certainly Homer Douglas Francis litigation. This court has been careful to preserve the rights of all parties who appeared before it. I am sure that if the court had not been so impartial, we would have concluded these matters a long time ago. Your motion will be denied, Mr. Ashton." [R. Ex. - 3 pg. 19, 20].[6]

There is absolutely no indication anywhere in this statement that Judge Ross felt she was approached improperly, that she believed her objectivity was impaired or that she knew herself to have been otherwise compromised in any fashion from carrying out her sworn duties:[7] in sum, that she had been approached and as a result of an ex parte communication, had been importuned. We arrive at this conclusion with due consideration of the fact that Judge Ross, on October 13, 1987, reported to the F.B.I. that she went to Attorney Vaira because she believed that Respondent was attempting to influence her decision in a case before her. Judge Ross' testimony before the J.I.R. contradicts this position, as does the testimony of Attorney Vaira.[8] Furthermore, the seventeen months interim

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6 See Judge Ross' testimony (T.R. - 935 to 972).

7 Judge Ross testified that she never disclosed Respondent's visit to parties or counsel in the recusal proceedings. (T.R. - 26, Vol. 24).

8 According to the F.B.I. interview of Judge Ross on October 13, 1987, she stated, 1). Respondent saw her on behalf of Attorney Lampl, 2). that she first reported Respondent to the J.I.R.B. via Mr. Keuch and 3). when she called Respondent after his visit she asked for the identity of the "two guys." Judge Ross' report to the F.B.I. contradicts her earlier testimony. (See R. Ex.-1, T.R. - 810, 894-896, 900, 933). For further details see F.N. 5, supra.

between the visit, the meeting with Vaira, and the F.B.I. interview, together with other contradictory statements in Judge Ross' testimony suggest that Judge Ross may not have had a clear memory of this, a view substantiated by the Judge's testimony that she does, in fact, have a faulty memory. [T.R. - 978, 979, 997].

Furthermore, subsequent to the May 30, 1986 meeting the evidence establishes that Judge Ross met and communicated with Respondent on a number of occasions (Judge Ross acknowledged that Respondent arranged to have her seated on the dais at the AFNA Dinner in Philadelphia; Judge Ross sent a personalized note to Respondent on November 25, 1986, apologizing for not being able to attend the December 12, 1986 labor tribute for Respondent, and informing Respondent she sent a $50.00 contribution in his honor; while attending the March 26, 1987, viewing of Judge Watson's mother, Respondent and Judge Ross joined in a friendly visit and conversation).[9] Given the apparent friendly, collegial nature of these encounters, it is beyond our comprehension that a person of Judge Ross' stature and expertise on judicial ethics could have continued a cordial relationship with Respondent were she of the belief that he had deliberately sought an ex parte contact with her in an attempt to influence her mind on a matter before her and as a result had compromised the integrity and indepenence of the judiciary and/or otherwise conducted himself with impropriety.[10] On April 19, 1987, the *Greensburg Tribune Review* published an article which described a favorable land deal that Respondent had made which involved Attorneys Ashton and Lampl. Judge Ross testified that this article caused her to feel troubled about Respondent's visit eleven months prior in light of the newspaper's revelation that Respondent had purchased land from a client of Attorney Ashton's. [T.R. - 875].[11] Nonetheless, Judge Ross

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9 Judge Ross testified that she considered their relationship to be one of acquaintance rather than friendship. (T.R. - 814).

10 Section 608.8, Pennsylvania Evidence, Packel and Poulin (1987), Inconsistent Conduct.

11 Judge Ross testified: I just saw the favorable deal. I knew it preceded the visit by a few weeks or days. I knew that the matter [Botula's preliminary objections in the Francis Estate] was pending and I reported it. It's up to the Board to draw conclusions. (T.R. - 875)

did not formally file a complaint with the J.I.R.B. at this time. The record demonstrates that Judge Ross did not report any complaint against Respondent to the J.I.R.B. until September 9, 1987, some five months after the *Greensburg* article and sixteen months after Respondent's visit to her chambers on May 30, 1986. [T.R. - 823].

We take "official notice"[12] of the minutes of a scheduled conference call on May 18, 1987.[13] Participating in that conference call were, Judge Rowley, Judge Ross, Judge Bonavitacola,[14] Judge Munley, Justice Kauffman, James Higgins, Mrs. Scarlata and Mr. Keuch. Attorney Hoyle did not participate, and at this point in time there was one vacancy on the Board. The minutes of the May 18, 1987 meeting reveal that Board Counsel brought to the Board's attention the following:

> . . . Counsel then discussed a matter involving Justice Larsen. Newspaper articles in Allegheny County indicated that the Justice had purchased a tract of land under very favorable financial conditions from an individual who, at the time of the purchase, was

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12 The doctrine of official notice has been defined by the Commonwealth Court in *Falasco V. Commonwealth Probation and Parole Board,* 521 A.2d 991 (1987):

> "Official notice" is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

Id. at ____, n. 6, 521 A. 2d 994 n. 6 (citations omitted).

13 The J.I.R.B. conducts its affairs at meetings/sessions when it assembles or convenes in person at Board Headquarters or in telephone conference. Minutes of the meetings are regularly recorded by Board Counsel and are later distributed to all members of the Board.

14 Judge Bonavitacola resigned from the J.I.R.B. on 8/15/88 and did not participate in Board Matter 140.

in bankruptcy. The articles alleged that the sale was not approved by the bankruptcy referee as is required by the law and also pointed out that the attorney for the bankrupt was an individual who had been disbarred but reinstated to practice upon a decision by the Supreme Court which was joined in by Justice Larsen. Particularly of concern is the fact that the property was sold for a small amount of money because at the time of the sale there were a number of pending liens against the bankrupt property but that those liens were satisfied shortly after the sale when a transfer of property to Westmoreland County was completed which transfer involved, among other things, the County commitment to pay off the bankrupt's liens. . . ." [5/18/87, Minutes of Conference Call. Note Judge Ross' testimony, F.N. 16 infra.].

A review of the minutes of this Board conference call reveals that Judge Ross participated in the telephone conference and in the Board action taken on the allegations relating to the Respondent. During this conference a motion was made and unanimously approved by the Board directing that a letter of inquiry be sent to Respondent. The recorded minutes of the conference call also confirm that Judge Ross actively took part in other unrelated matters on the agenda during the session. It is significant in this scenario that the minutes do not reflect Judge Ross' reporting or making any complaint to the Board of her May 30, 1986 encounter with the Respondent. In light of the fact that the newspaper article was formally introduced and presented to the Board by Board Counsel and that the Board not only considered Mr. Keuch's report but took formal Board action with respect to it, it is difficult to understand Judge Ross' reluctance to report Respondent's conduct to the Board at this time. We can only interpret Judge Ross' silence in the face of this development as ambigious and inconsistant. One would naturally expect a person in the circumstances of Judge Ross to take advantage of such an opportunity to unburden herself.[15] Equally ambigious is Judge

15 Section 608.8, Pennsylvania Evidence, Packel and Poulin (1987), Inconsistent Conduct.

Ross' testimony that it was inconvenient to report it to the Board and Judge Rowley. This testimony is inconsistent with the fact that Board meetings were continually held throughout the period [April, 1987 through September, 1987], and having reported to Judge Rowley on May 26, 1987, according to Judge Ross, she never again mentioned the subject to him, despite being with him on numerous occasions where Board business was being conducted. [Compare T.R. - 897, 898, 1134].

At the time of Judge Ross' testimony before the Board in 1988 she acknowledged that she still did not know the reasons for Respondent's May 30, 1986 visit but that she wanted the Board to review the matter and for the Board to draw its own conclusions. [T.R. - 875, 879].

Judge Ross sought out a number of persons for the purpose of discussing Respondent's visit to her. The collective testimony of these witnesses establishes that Respondent's visit either appeared to be routine and in no way significant or that they had little or no recollection of Judge Ross' communication to them at all. Particularly significant in this regard is the stipulation provided by Judge Joseph Cosetti of the U. S. Bankruptcy Court and the testimony of Judge James Rowley, Chairman of the J.I.R.B.. Judge Cosetti stated that if Judge Ross had told him that Respondent had intervened with her on the Francis case, "that fact . . . would be so unusual that he would probably remember it." [T.R.- 132, 133]. Judge James Rowley, when asked if there had been any indication from Judge Ross that there was some impropriety on the part of Respondent, testified that if there had been, he would have advised her to report it to the Board and he would have reported it also. [T.R. - 1112, 1113]. Judge Rowley recalls having only a conversation with Judge Ross on May 26, 1987, en route from the airport to J.I.R.B. Headquarters during which, according to his testimony, he said that Judge Ross never made any statement about an alleged impropriety by Respondent.[16] Nei-

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16 [Peruto] Q. When you met with Judge Rowley, how did this come up that you told him?

[Judge Ross] A. Judge Rowley and I were riding from the airport to the meeting. [May 26, 1987]. We were together in the back of the automobile. In April of 1987, articles that appeared in the Pittsburgh newspaper and also in the Greensburg Tribune Review which indicated that Justice Larsen had

ther Judge Cosetti nor Judge Rowley recall any communication from Judge Ross regarding Respondent's visit to her as suggesting that a violation of the Canons had occurred. It is significant that neither of these judges, as a result of the communication with Judge Ross, felt that they should report Respondent to the J.I.R.B..

The evidence supports a finding that a visit from Respondent to Judge Ross did occur on or about May 30, 1986. In spite of Respondent's testimony as to the details of this visit which are at variance with those of Judge Ross, the evidence as indicated by the actions taken by Judge Ross points to a conclusion that the Francis Estate and Botula may have been mentioned, in the context of the bankruptcy [Lo-Vol Fuels]. However, owing to the multitude of contradictory and inconsistent material in Judge Ross' testimony it is impossible to ascertain with any degree of certainty what transpired during the visit of Respondent. Even if Respondent's version of the events is rejected out of hand, there is no concomitant reason to accept Judge Ross' version totally. It cannot be insisted upon too strongly that if there is a kernel of truth there, as seems likely, there is still no indicia of how much truth, based upon Judge Ross' testimony.

Board counsel maintains that Respondent went to see Judge Ross on behalf of Attorney Ashton in return for a favorable land deal realized as the result of Ashton's efforts on behalf of the Respondent. However, there is no evidence in the record to establish that Respondent knew Attorney Ashton had a client

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received a conveyance of real estate, a favorable conveyance of real estate from a bankruptcy estate in which Mr. Lampl and Mr. Ashton had been involved.

I told Judge Rowley about the newspaper article and said that I also had had a case involving Mr. Lampl and that Mr. Ashton was his attorney and that Justice Larsen had come in to see me. Now, the real estate deal took place the prior year. It did not take place in 1987. It took place in the spring of 1986. But it was reported in the 1987 April newspapers.

[Peruto] Q. When you told this to Judge Rowley, was it in the kind of chat concerning these events as being kind of current events of interest —

[Judge Ross] A. No. It was —

[Peruto] Q. — or was it told to him by way of reporting for the purpose of discipline?

[Judge Ross] A. I was reporting it to Judge Rowley as chairman of the Board.

[T.R. - 823, 824].

involved in the Francis Estate. [T.R. - 866]. The record further establishes that Attorney Ashton had no reason to believe that udge Ross would rule against him in the Francis proceedings. The record demonstrates that during the course of the Francis Estate proceedings Judge Ross did not reprimand any of the parties involved or give Attorney Ashton any reason to feel threatened by her judicial authority. Therefore, the argument made that Respondent was indebted and friendly to Attorney Ashton and sought to repay him this debt by a visit/conversation with Judge Ross for the purpose of helping him in the Francis Estate is not supported by the record. In fact Judge Ross testified: "I never scolded the parties . . . ." [T.R. - 936]. I never accused the attorneys of improprieties, I have no idea why Respondent or anyone else would come to see me on their account and ask me to take it easy on them. [T.R. - 936, 937]. Furthermore, Judge Ross testified that she did not believe that Respondent wanted to aid Attorney Ashton. [T.R. - 866]. Failing to establish linkage between Respondent's acquisition of land and his visit to Judge Ross on or about May 30, 1986 I remain unconvinced that Respondent sought or attempted to influence Judge Ross on a matter pending before her, an action that would constitute an e pe communiation, vis a vis, Canons 3 A(4).

The Respondent is charged herein with violating Canons 1, 2, and 3 A(4) of the Code of Judicial Conduct, adopted by the Supreme Court on November 21, 1973 and made effective as of January 1, 1974. Canon 1 of the Code discloses and mandates as follows:

> A Judge should Uphold the Integrity and Independence of the Judiciary
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 provides:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3 provides:

A Judge Should Perform the Duties of His Office Impartially and Diligently

A. Adjudicative Responsibilities . . .

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, must not consider ex parte communications concerning a pending proceeding.

The standard of clear and convincing evidence requires the Board to examine closely the burdened party's evidence. *La Rocca Trust*, 411 Pa. 633, 192 A.2d 409 (1963). In *La Rocca* the court defined clear and convincing as:

". . . the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the fact-

finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue . . ."

Id. at 640, 192 A.2d at 413.

The requirements for clear and convincing evidence as outlined in the law places a burden on the factfinder that prohibits him from engaging in speculation and conjecture. Inference or the suggestion of fact cannot be viewed as proof. The evidence establishes culpability only if it is certain, complete and unequivocal.[17] Circumstantial evidence and inference may only be considered as deducible from the evidence if they are ". . . so conclusive as to exclude any other reasonable inference or deduction . . ." *Wagner V. Somerset County Memorial Park*, 372 Pa. 338, 341, 304 A.2d 134, ____ (1973). Judgment in such matters is made with full and complete consideration of the credibility of the testimony in light of the evidence and with conviction in the mind of the factfinder that he comes to a decision without hesitancy, convinced of the truth of the charge. The responsibility of a judge to evaluate a case in light of this standard is one of the fundamental responsibilities of his office and carries with it a heavy duty that can never be compromised.

In this matter Judge Ross' testimony has been key to our deliberations and we believe that although lengthy it cannot be taken verbatim. The Board has received this matter which was rendered more difficult to appraise because of uncertainty and inconsistency in the statements and actions of Judge Ross, owing to what she says is a poor memory and which was based upon a diary she prepared that is sketchy and incomplete.

The evidence in this case provides us with no clear and precise understanding of Respondent's visit to Judge Ross' chambers on or about May 30, 1986, nor do we have, in spite of a voluminous record, actual knowledge of the reasons why Respondent visited Judge Ross, beyond Vaira's conflicting testimony[18] that Respondent conveyed to her information, in some context, about a bankruptcy fraud. We still do not know

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17 See Section 303.2, Pennsylvania Evidence, Packel and Poulin (1987).

18 See Findings of Facts 40 through 45, pgs. 7-8 supra.

to what extent the Francis Estate and the Lo-Vol Fuels bankruptcy case were mentioned, in what context or for that matter who introduced the subject into the conversation. It is our belief that it would be counterproductive to speculate on what was discussed at the time of Respondent's visit to Judge Ross. Moreover, and more importantly, tempting as it is to conject on this discourse, conjecture unsubstantiated by evidence is totally unacceptable in a judicial proceeding. Substantiating testimony which would have suggested more serious purpose on Judge Ross' part to question Respondent's conduct and motive is significantly absent. Furthermore, Judge Ross herself exhibited no awareness of having been unethically interfered with or imposed upon in the context of the Canons, more particularly Canons 1, 2 and 3 A(4), in that she did not follow the "exclusive mode" for disciplining judges or recuse herself from the ongoing litigation, the Homer Douglas Francis Estate, which presumably in all reasonableness, she would have were the circumstances to the contrary.

Consequent to the foregoing, I find there is no evidence which clearly and convincingly establishes any effort on Respondent's part to approach Judge Ross with an ex parte communication for the purpose of importuning her within the purview of the Code of Judicial Conduct.

SUPPLEMENTAL DISCUSSION

The Majority, having refiltered the evidence, now bases its finding of Respondent's culpability on the testimony of two secondary witnesses. The testimony of these two witnesses covers approximately 42 pages in this 3,500 page record. Apparently the Majority posits that the remaining overwhelming testimony is unclear, uncorroborated or conflicting. While it is well established that the number of witnesses does not control any given case, but rather it is the witnesses' credibility or believability and the weight that the factfinder attaches to these witnesses which is the controlling factor, I simply point out the comparative mathematical computation for illustrative purposes. *Commonwealth V. Flick*, 97 Pa. Super. 169 (1929); *Commonwealth V. Wolfe*, 81 Pa. Super. 512 (1923); *Commonwealth V. Shadduck*, 168 Pa. Super. 376, 77 A.2d 673 (1951);

Braunschweiger V. Waits, 179 Pa. 47, 36 A. 155 (1896) and *Cf. Commonwealth V. Stabinsky*, 313 Pa. 231, 169 A. 439 (1933). The Majority now maintains that Judge Ross is corroborated by Vaira and Johnson, and Peter Vaira, the principal secondary witness, is really the underpinning in this theory. Judge Ross telephoned Johnson on the instructions/advice of Peter Vaira, and Johnson had no independent recollection of the call, submitting a memo in lieu of testimony. (See pg. 45, infra).

Fundamental in our system of jurisprudence is the significance of meeting the burden of proof. At this juncture, we remain faced with the responsibility of arriving at a decision of guilt or innocence of Respondent for violating Canons 1 and 2 of the Code of Judicial Conduct. That decision must be rendered with full and complete regard for Respondent's basic fundamental constitutional rights. Ultimately this decisional process must embody a judgment or recommendation to the Supreme Court of Pennsylvania wherein the time honored doctrine of clear and convincing evidence, supra., is construed and applied. The Supreme Court has repeatedly explained that the JIRB, in making it's findings and drawing conclusions, must adhere to the clear and convincing standard of proof. *Matter of Slyvester*, 521 Pa. 300, 555 A.2d 1202 (1989); *Matter of Braig*, ____ Pa. ____ 554 A.2d 493 (1989), *J.I.R.B. v. Snyder*, 514 Pa. 142, 523 A.2d 294 (1987). Furthermore, "[t]he inferences to be drawn from testimony presented is also a matter for us (Supreme Court) to make based on our review of the evidence." *Matter of Chiovero*, ____ Pa. ____, 570 A.2d 57 (1990), at 60; see also *Matter of Cunningham*, 517 Pa. 417, 538 A.2d 473 (1988).

Respondent has in this case consistently and, as it is his constitutional right to do, maintained his innocence of the said charges. Thus the credibility of the party initiating the charges against Respondent for violation of Canons 1 and 2 and the credibility of the inferior witnesses who support these allegations are of controlling importance. The testimony of parties and witnesses on which the Majority has hinged its conclusions are in essence three: (1) Judge Ross, member of the J.I.R.B., the principal/key witness in this case; (2) Attorney Peter Vaira, Judge Ross' friend and advisor and (3) Attorney

Jerry Johnson, a U. S. District Attorney and acquaintance of Judge Ross and Peter Vaira. The testimony of other parties — Judge Rowley, Chairman of J.I.R.B., Judge Cosetti a Federal Bankruptcy Judge, Respondent, et al. is given little or no regard in the Majority's findings.

I have addressed in my original discussion, supra., the uncertain, unclear, ambigious and contradictory nature of the collective testimonies of Judge Ross, Peter Vaira and Attorney Johnson. The most particular area of confusion centers around the case of the *Francis Estate* and the case of the *Lo-Vol Fuels Bankruptcy*. Consistently throughout the testimony the accusation made against Respondent for allegedly conducting a conversation with Judge Ross of an ex parte nature centers on Respondent's referring to the *Francis Estate* which Judge Ross had before her. However, in unraveling the multitudinous testimony in this case, Respondent's alleged conversation with Judge Ross appears to have been concerned with a fraud involving the Lo-Vol*[99;lr Fuels Bankruptcy*, a case which may share with the *Francis Estate* some of the main actors and scenery but which is itself separate and distinct in that it is a proceeding filed in the federal court system and not in Judge Ross' jurisdiction. The following outline of the testimony reveals the elements of this confusion.

CASE SCENARIO

(1) JUDGE ROSS - JUDGE COSETTI

(a) Judge Ross testified that she told Judge Cosetti about reporting to the F.B.I. the *Lo-Vol Fuels* matter. [T.R. - 859].

(b) ". . . during late 1985 and early 1986, we discussed the level of wrong-doing that had been exposed in the *Lo-Vol Fuels* case and he (Judge Cosetti) and I agreed that I would report it to the F.B.I." [T.R. - 860].

(c) When Judge Ross was asked if the *Francis* case was ever before Judge Cosetti she replied, it "never (was) before Judge Cosetti. It was Judge Gibson's case. And it passed to Judge Markovitz, but he didn't retake it until sometime in 1986, I guess." [T.R. - 860].

(d) Judge Ross telephoned Judge Cosetti of the Bankruptcy Court in July, 1986, "Judge Cosetti said that he wanted to tell me something about my *Homer Douglas Francis* case, and I said what is that, and he said that he and his law clerk had been at the Duquesne Law Alumni dinner and had observed John Botula talking in a very loud voice about my *Homer Douglas Francis* case to Judge Paul Zavarella, and I said to him that I had reported the *Low Vol Fuels* (sic) case and my *Homer Douglas Francis* case, the portions of my case that related to the *Lo-Vol Fuels* case to the F.B.I. and that I had also reported (Respondent's) visit to me, and I told him what the Justice said to me. I said that (Respondent) came to see me and said look, I met two guys on the street and they said to tell Judge Ross in the *Homer Douglas Francis* case that John Botula got all the money and put it in a condominium in Florida." [T.R. - 820, 821].

(e) Judge Ross stated that she told Judge Cosetti that she reported to the F.B.I. the matter involving *Lo-Vol Fuels*, which she referred to as the alter ego of *Francis*. [T.R. - 859].

By way of stipulation, Judge Cosetti contradicts, in part, Judge Ross. The stipulation reads as follows:

> "It is hereby stipulated and agreed among the parties that Judge Joseph P. Cosetti of the Bankruptcy Court of the Western District of Pennsylvania, if called to testify, would testify that he had a number of telephone conversations with Judge Ross in 1986 and 1987. That the substance of those conversations was the handling of the Lo-Vol Fuels case in the Bankruptcy Court and how it impacted on the Homer Douglas Francis Estate before Judge Ross. He would also testify that he does not remember Judge Ross telling him that Justice Larsen had intervened with her on the Francis estate and that fact, if clearly communicated to him, would be so unusual that he would probably remember it."
>
> [T.R. - Judge Ross, 6/10/89 - 132, 133].

(2) ATTORNEY LAMPL

When questioned in regard to Mr. Lampl, Judge Ross testified to the fact that Mr. Lampl represented the bankrupt's estate [*Lo-Vol Fuels*] in Bankruptcy Court and further stated that in her assessment of funds in the case before her, she relied on the bankruptcy case. [T.R. - 842, 843]. "We could only go by the testimony he gave us plus the bankruptcy record." [T.R. - 843].

(3) THE F.B.I.

Judge Ross met with the F.B.I. agents [on May 15, 1987] in connection with the *Lo-Vol Fuels Estate* rather than any complaint about Respondent. [T.R. - 892, 893]. She stated: "The *Lo-Vol Fuels* case was not before me. That's what I reported to." [T.R. - 850]. The *Lo-Vol Fuels* case was the alter ego of the *Francis* case. The assets of *Lo-Vol* Fuels were part of the *Francis Estate* ". . . but those weren't the matters that were referred to the F.B.I." [T.R. - 850]. Judge Ross stated: "They were not investigating my case. They were investigating the *Lo-Vol Fuels* case." [T.R. - 851]. "Matters I referred to the F.B.I. were not matters that I was litigating." [T.R. - 852]. When asked what the *Lo-Vol Fuels* case had to do with the *Francis* case, Judge Ross replied: "It had nothing to do with me specifically." [T.R. - 853].

(4) ATTORNEYS VAIRA - JOHNSON

(a) Judge Ross called Attorney Jerry Johnson on June 9, 1986 at his office and told him about Respondent's visit to her chambers. "I told him that (Respondent) came to see me, what his words were and I was passing it on to him to pass on to the F.B.I. as a tip." Judge Ross passed this information on to Johnson because this is what her good friend and attorney, Peter Vaira advised her to do. [T.R. - 891, 892].

(b) I find further evidence that the F.B.I. was investigating the *Lo-Vol Fuels Bankruptcy* case and not the *Francis* case from the following testimony of Judge Ross: "I telephoned J. Alan

Johnson, the United States Attorney in Pittsburgh, and he was familiar with the fact that there was an ongoing criminal investigation of the *Lo-Vol Fuels* case. And I said that I had something to report to him concerning that matter and it consisted of a conversation that (Respondent) had with me, that he came to my chambers. And then I repeated what (Respondent) had said." [T.R. - 928]. (c) It is Mr. Johnson's recollection that: "When I got the call — again, this is *my opinion* on what happened. I would focus on the information concerning the bankruptcy, as I sit here now and try to think back. Again, it's *opinion*. I focus on the information about the bankruptcy, and I would refer that to the appropriate assistants." [T.R. - 1058].

The above testimony suggests that Judge Ross' concern about irregularities which she brought to the attention of the F.B.I. was focused on the *Lo-Vol Fuels* case and that she understood this case to be separate from the *Francis Estate*. Judge Ross' reactions relative to the alleged "tip" brought to her by Respondent in seeking out advice from her attorney, Peter Vaira, and following Vaira's advice to report the "tip" to Attorney Johnson seems logical if considered as related to *Lo-Vol Fuels* and not *Francis*. Judge Ross' later conversation with Judge Cosetti in which Judge Ross testified that she had told the Judge of Respondent's conversation with her concerning *Francis* but which Judge Cosetti stipulated concerned *Lo-Vol Fuels* also points to a tendency on Judge Ross' part to cloud the distinction between *Francis* and *Lo-Vol Fuels*. Although Judge Ross testified that *Lo-Vol* ". . . had nothing to do with (her) specifically" [T.R. - 853], she also viewed it as the "alter ego" of the *Francis Estate* case. [T.R. - 850].

Assuming argumendo that the *Francis Estate* and "Botula" were mentioned in some context during the visit of Respondent to Judge Ross, I think there exists a more plausible, logical explanation than the one the Majority suggests — an explanation which would certainly serve to explain the unbelievable, contradictory testimony of the key witnesses in this case. After a close reading of the testimony, it appears that the context in which the "tip" was transmitted, as indicated by Judge Ross, points to a fraud involving the *Lo-Vol Fuels* matter and not the *Francis* case which was at that time pending before Judge Ross. This analysis is consistent with Judge Ross'

"troubled" calls to Vaira and Johnson and her behavior following May 30, 1986 — specifically, her failure to report a violation to the Judicial Inquiry and Review Board and/or to Judges Zavarella and Schwartz and her silence on the matter during the J.I.R.B. conference call May 18, 1987. Further, it ties together logically with the testimony of Judge Rowley and the stipulation of Judge Cosetti as well as Judge Ross' continued relationship with Respondent following the visit of May 30, 1986.

After a careful review of the facts, I conclude that the alleged comment concerning Botula referred to the *Lo-Vol Fuels* proceeding in federal court, not the matter pending before Judge Ross. The F.B.I.'s ongoing investigation of the *Lo-Vol Fuels* case evidenced reports of a possible bankruptcy fraud before and after the visit. Vaira and Johnson's characterization of the matter is consistent with this conclusion.

Judge Ross endeavored to explain when an ex parte communication can be improper when she stated: "I've explained to you judges discuss cases." [Ex. B-10 at pg. 19]. "You have no comprehension of judicial ethics then." [Ex. B-10 at pg. 13]. "I've explained to you an ex parte communication between judges of the same level is not wrong. Judge Schwartz and I discuss cases. This is just what you do. You do not discuss cases with appellate judges." [Ex. B-10 at pg. 18]. In light of Judge Ross' profound explanation of an ex parte communication, one can understand the pattern of Judge Ross' behavior and her failure to report the matter to the Judicial Inquiry and Review Board, as well place in syncopation all of her otherwise inconsistent conduct and contradictory statements. When Judge Ross was asked if she considered Respondent's visit as ex parte, she emphatically stated: "Absolutely not. He's not a party." [T.R. - 861]. If and when the *Lo-Vol Fuels* matter was discussed Judge Ross considered Respondent and herself on the "same level". Thus the true test relative to ex parte rests on the distinction between a bankruptcy case in federal court and an estate case in a state court, two separate cases.

Furthermore, I submit that the Majority's findings of fact are indicative of the inability to distinguish between these two cases in their treatise. [*Lo-Vol Fuels Bankruptcy* and the *Francis Estate*]. Fact #13 of the Majority Report refers to Attorney

Botula as a creditor of *Lo-Vol Fuels* who had taken $200,000.00 of the *Lo-Vol* assets. [Majority Opinion - 5]. Whereas Fact #34, refers to Attorney Botula as a creditor of the *Estate* who received $200,000.00 of the assets. [Majority Opinion - 8]. The facts as stated, supra., are clearly contradictory and serve to highlight the disarrangement present in the Majority's reasoning. The *Lo Vol Fuels Bankruptcy* and the *Francis Estate* are worlds apart [in that the former is a federal proceeding, while the latter comes within the purview of state jurisdiction] for purposes of this analysis. It is critically significant that the Majority's final draft fails to grasp the importance of the distinction that needs to be drawn between these two proceedings. Therefore, I submit the true focus of inquiry here is completely lost to the Majority's discernment.

Reiterating my previous view as set forth in my original discussion, supra., I find it next to impossible to reconstruct the nature, context, content and motivation of the conversation which took place between Respondent and Judge Ross on May 30, 1986. But if we are to evaluate the above outlined testimony of Judge Ross in light of the testimony of Attorney Vaira and Judge Cosetti's stipulation, there is a convincing body of statements which point to the likelihood that the alleged conversation included in some fashion that Botula was involved in a fraud in the *Lo-Vol Fuels* case.

I agree with the Majority that Judge Ross' contradictory, uncorroborated testimony cannot in and of itself constitute clear and convincing evidence, [Majority Opinion - 31] and that "her recollection, uncorroborated by outside events, is not persuasive because it is . . . affected by an interpretation . . . arrived at by looking back at the conversation . . . when her mind was colored by a newspaper article that accused Respondent of ethical violations . . . ." [Majority Opinion - 34, 35]. I do not, however, agree with the Majority's acceptance of Judge Ross' reports to Attorneys Vaira and Johnson and that her actions around the May 30, 1986 conversation constitute reliable evidence. A review of Judge Ross' actions following the May 30, 1986 conversation and the testimony of all parties called reveals confused, contradictory and unclear actions and statements and, in general, a chain of events which weave in and out with little or no direction or clarity. If we are to rely on the

testimony of Attorneys Vaira and Johnson, (to the exclusion of all others) we are again faced with confusion and contradiction, since no context is adequately provided.

At the outset, Attorney Vaira admitted having had a bad memory, ". . . my memory is not that good." [T.R. - 1049] and he testified that he made no contemporaneous memorandum of his conversation with Judge Ross two years prior. [T.R. - 1031]. When questioned as to whether Judge Ross told him that Respondent was attempting to influence her decision, he testified "No". [T.R. - 1039]. He further stated: "I wasn't there. I didn't hear his tone of voice. I didn't hear word for word verbatim what he said . . . ." [T.R. - 1041]. Thus Vaira's testimony is based on an attempt to reconstruct from memory Judge Ross' version of Respondent's visit as recounted to him on June 5, 1986.

I maintain that Peter Vaira's testimony is not credible. Vaira's testimony demonstrates that he cannot remember the important facets of the conversation between Judge Ross and Respondent. Vaira spoke of mob figures and narcotics in his official report to the Board on November 9, 1987, and when questioned concerning this characterization that he conjured he replied, he doesn't know where that came from. [R. Ex. - 23] [T.R. - 1049]. He stated that he felt the essence of Judge Ross' conversation with Respondent concerned a bankruptcy matter not mob figures and narcotics. [T.R. - 1026, 1032, 1045]. Judge Ross testified that Respondent told her that he met two guys on the street. [T.R. - 809]. Vaira testified that his recollection was that Judge Ross told him that Respondent met one person on the street: "Justice Larsen related to her a conversation that he met *someone* on the street. She didn't tell me who it was. *This* person had given (Respondent) some information about really where the money had gone in this estate." [T.R. - 1024, 1025]. Vaira repeatedly testified that he recalled Judge Ross saying one person. [T.R. - 1043]. Of further significance is the fact that Judge Ross only told him one side of the conversation. Vaira testified that Judge Ross told him that her contribution to that communication was simply, "Well, thank you very much." [T.R. - 1034]. Peter Vaira's recollection of what Judge Ross told him is incongruous with the testimony in this record that states Judge Ross actively engaged

in the colloquy between herself and Respondent. [See Finding of Fact 32, supra.]. The essence of that exchange was selected by the J.I.R.B. for inclusion in the formal charges it issued to Respondent. [See Board's Formal Charges, Charge I, paragraph 14, page 3]. Disregarding Vaira's poor memory and contradictions in his testimony, the Majority nonetheless draws the unbelievable and illogical conclusion that Vaira is a credible witness.

Another issue of paramount importance which the Majority has failed to consider is that of the attorney/client relationship which exists between Judge Ross and Vaira. Were there matters of confidentiality between Vaira and Judge Ross that, of course, were not disclosed in the testimony? The Majority ignores both the attorney/client relationship and the family friendship and maintains the position that Vaira is a disinterested and objective witness in this case. Attorney Vaira does not fit this description.

Disinterested is defined as "[n]ot concerned, in respect to possible gain or loss, in the result of the pending proceedings or transactions; impartial, not biased or prejudicial."

Disinterested Witness is "[o]ne who has no interest in the cause or matter in issue, and who is lawfully competent to testify." Black's Law Dictionary, 5 Ed.

I find it exceedingly difficult to consider Attorney Peter Vaira a disinterested witness considering the fact that when Mr. Vaira took the stand he was Judge Ross' lawyer. I hold the office of attorney in the highest esteem, however this is not to say that counsel in such circumstances would not or should not be prejudiced in favor of his client. Mr. Vaira, also testified to the existence of a family friendship, "Judge Ross is a friend of my Uncle Lewis, Lewis Vaira, who practices in Pittsburgh. . . . [T.R. - 1022], [they] went way back." [T.R. - 1030]. Consider further that Attorneys Vaira and Johnson had been sought out by Judge Ross on earlier cases, the adoption rackets. From the witness' testimony, it is evident that they were proud of their success in solving the adoption rackets and the cooperative relationship they had with Judge Ross in these cases. [T.R. - 1030, 1031]. In the *Francis* matter, the depths of Vaira's personal entanglement were not explored or ascertained, but Vaira's association with Judge Ross stands out like a beacon.

Perhaps the heaviest part of the baggage was the fact that Judge Ross had offered him a court appointment, Administrator Pro Tem in the *Francis Estate*, a position which carried with it the assurance of receiving compensation (pecuniary interest) as well as earned professional recognition at having been selected by a jurist for his expertise in handling sensitive matters. [T.R. - 857]. *College Watercolor Group, Inc. V. William H. Newbauer, Inc.*, 468 Pa. 103, 360 A.2d 200 (1976); *Anderson V. Pittsburgh Rys.*, 423 Pa. 550, 225 A.2d 548 (1967). Mr. Vaira does not appear as disinterested and objective as the Majority would make him out to be.

The fiber of Attorney Peter Vaira's testimony is rent by a troubling collection of factors that would cause the most neutral observer to question its reliability and value. Those factors are, that:

(1) Admittedly there was a prior association between Judge Ross and Peter Vaira, both professional and familial;

(2) Judge Ross had turned previously to Peter Vaira for assistance in a professional capacity — the Adoption Racket Cases;

(3) Witness Vaira, during his testimony, exhibited professional pride in his participation in prior legal matters with Judge Ross;

(4) The witness Peter Vaira testified that in the past the same professional combination [from Judge Ross to Peter Vaira to J. Alan Johnson] had achieved success — the Adoption Racket Cases;

(5) Mr. Vaira was called as a Board witness and as such it was not suprising there was a marked correlation of the facts between Peter Vaira's testimony and the Board's theory of the case. The panel's questions prompted immediate and lengthy response from the witness Vaira in speculative areas that paralleled the Board's position in this case;

(6) The illuminating testimony of Judge Ross revealed that she had offered to Mr. Vaira the central role in the *Francis Estate* — Administrator Pro Tem;

(7) Peter Vaira was Judge Ross' personal lawyer in the matter sub judice, and as such one would expect loyalty and support for his client;

(8) Attorney Vaira and Judge Ross were immersed in an

attorney/client relationship. It is true, from the evidence, that the matter of professional fees was not discussed. Nonetheless payment of fees is not requisite in order for that station to attach. Troubling too is the concern that all confidential communications were not revealed in the course of the examination of the witness, Vaira. For example, Mr. Vaira never revealed Judge Ross' offer that he assume the position of Administrator Pro Tem of the *Francis Estate*;

(9) Peter Vaira would have been compensated for performing the duties of Administrator Pro Tem by the appointing authority, Judge Ross;

(10) Mr. Vaira's appointment would have been both professionally and personally rewarding. Mr. Vaira, a Philadelphia lawyer, would have been selected by a jurist to handle what appeared to be a sensitive assignment in Pittsburgh;

(11) The foregoing, of course, would present the comfortable possibility of future rewarding and professionally advantageous appointments by Judge Ross or her Allegheny County colleagues.

When so analyzed, Mr. Vaira's commentary appears flawed. [T.R. - 1043, 1044, 1045]. Coincidentally, the Majority repeats these remarks mantrically in their Report. [Majority Opinion - 32, 39, 41, 42]. I do not accept Mr. Vaira's speculations and find them as they relate to Respondent and Judge Ross of dubious value to our further understanding of the facts in this case. I cannot agree with the Majority who accept the testimony of Attorney Vaira as persuasive evidence. There is something very disturbing about a decision which is based principally on testimony of a witness whose interest, as demonstrated by the record, reflects a rank favorable personal attitude toward the complaintant and who has a palatable involvement flowing between himself and the corpus of the matter sub judice.

In our system of rules and standards of evidence, "[c]ase law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case or in matters somehow related to the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." Section 40, McCormick on Evidence, 3rd Edition (1984). Based upon the above outlined

factors, I strongly opine that Peter Vaira's testimony should be dismissed from any analysis of this case.

Conveniently sandwiched between Vaira's generalizations is Judge Ross' telephone conversation with Attorney Johnson — a conversation which Johnson acknowledges he does not recall. The intent and purpose of this call is not clearly demonstrable to an astute observer. Nonetheless the Majority choses to emphasize the mechanical action of Johnson in his making note of the call. Given the lack of credit attributed to Judge Ross' testimony, supra., [See also Majority Opinion - 31], I find it remarkable that the Majority would posit that mere repetition to another could in effect restore credibility. I contend that Johnson's actions in response to Judge Ross' call were simply reflex gestures and, therefore, I can attach no significance to them.

This case represents a situation that could be described as cottony. As it has been represented to the J.I.R.B., it is replete with evidence of alleged wrongdoing on Respondent's part that is weak, misleading and uncorroborated. The key witness in the case, a respected member of the judiciary and a member of the J.I.R.B., has been discredited as a reliable witness due to a faulty memory and contradictory, uncorroborated testimony. The secondary witnesses fall into two categories: (1) those who restate in some manner Judge Ross' testimony but are themselves contradictory, uncorroborated or internally flawed, and (2) those who do not corroborate Judge Ross' testimony but offer either a different version of it or do not recall it. I disagree with the Majority and find the corroborating witness' testimony as only a restatement of Judge Ross' testimony and not persuasive or even acceptable when held to be the underpinning on which the Majority's findings are made. I find the testimony of the corroborating witnesses, which has been selected by the Majority as the basis for finding Respondent culpable, just another incredible account of Judge Ross' version of the May 30, 1986 visit. This recounting of Judge Ross' conversations with them is confused and must at best be considered hearsay. Yet the Majority confidently relies on this weak, confused and discredited testimony, while it goes about expunging the testimony of the primary witness on which it is based. I hesitate to concur in any judicial report which

bases its judgment on such evidence.

In the absence of any evidence which would be viewed in a court of law as clear and convincing, the Majority, nonetheless, asks us to make the quantum leap to a finding that holds the Respondent in violation of Canons 1 and 2. The Majority, in my opinion, bases its position on speculation uncorroborated by the evidence, conclusions arrived at by a process of convoluted reasoning, and a decision which ignores some of the most longstanding legal principles that form our body of law. The Supreme Court of Pennsylvania has recently held that the standards applicable in judicial discipline cases embrace all of the constitutional presumptions of innocence and all of the constitutional rights, privileges and immunities of an accused known to our civil and criminal jurisprudence. *Matter of Chiovero*, supra. In *Chiovero* the court stated, "[p]roceedings held before the Board have been held to be quasi-criminal in nature (cite omitted) and we have never held that a respondent-jurist before the board is not clothed with the fundamental constitutional rights available to criminal defendants." Id. at 61.

Substantial in the Majority's decision to find culpability and to impose sanctions based on the decision that an ex parte conversation took place are two factors: (1) Respondent's continued denial of the allegations made against him, in spite of what Majority views as convincing evidence to the contrary[19] and (2) the public mind's perception of the case. The absence of clear guidelines relative to sanctions for ex parte communications has been noted by the Majority. Yet, the Majority would hold Respondent subject to sanctions for embracing his constitutional right to maintain his innocence. In this I cannot concur. The Majority also believes sanctions must be leveled to satisfy a "public perception" of the guilt of Respondent, although they do not offer any measurable data to support this proposition. Unhappily or not, the public mind, never a clear

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19 I find Majority's employing Respondent's denial and defense of the charges and dwelling throughout their thesis on overpowering words and phrases such as "indicia of secrecy", "annonymous informants", "inherent ambiguity", "unanswered questions", "fraught with mystery" and "extortionist", improper and reflective of a mind set which has leaped beyond the bounds of the facts of this case and in so doing has cast grave aspersions unwarranted by the record.

barometer of any certainty — if in fact a barometer at all — is not the final arbitrator in our system of justice.

Our frame of reference must not be like that of the Roman Governor of Judea, Pontius Pilatus, who allowed the crowd to dictate the punishment of an accused man. (Mt. 27: 24-25). We .cannot yield our responsibility under the law by "washing our hands" when guilt is not demonstrated according to our system of jurisprudence.

I am in total agreement with the Majority's statements on the high stature of the Supreme Court and the importance of the public perception of integrity and competence of it's members. [Majority Opinion - 93, 94]. However, I feel convinced that, contrary to the Majority's concerns about public perceptions the public has very recently exhibited confidence in the Respondent by reelecting him to his high position for another ten year term, and it did this during the period in which media coverage of the matter currently at hand was most acute throughout the Commonwealth of Pennsylvania. A review of the vote cast in Respondent's retention election in the General Election of 1987 supports this conclusion. His vote for retention compares favorably with those cast for other Supreme Court Justices in retention elections [Respondent received 64%]. The no vote cast [36%][20] does not suggest that a large proportion of the voters favored removing Respondent. On the contrary, the turnout vote for Respondent was higher than the turnout in other Supreme Court retention elections, a fact which may suggest particular interest in the Supreme Court retention election of that year and illustrates the fact that a large number of voters may have very deliberately come out and voted "Yes" for the Respondent.

Our system of justice is blind and it is based solely upon laws, doctrines and principles, not the least of which is that a person cannot be found guilty in the absence of clear and convincing evidence. Clear and convincing evidence, which would point unerringly to misconduct on the part of Respondent, is totally absent here. Therefore, I cannot hold him censurable. See generally, *Matter of Sylvester*, supra.; *Matter of Braig*, supra.; *Matter of Cunningham*, supra.; *Matter of Dales-*

20 Data source: Commonwealth of Pa., Bureau of Elections, Harrisburg, PA.

sandro, 483 Pa. 431, 397 A.2d 743 (1979); *J.I.R.B. V. Snyder*, supra.; *Matter of Johnson*, 483 Pa. 227, 395 A.2d 1319 (1978); and *LaRocca Trust*, 411 Pa. 633, 192 A.2d 409 (1963).

This case has as many complex intricacies as Arachne's web. Although an enormous quantity of dissonant testimony has been heard and reflected upon with countless hours of reading, writing and critical deliberation, the final resolution of Respondent's accusation has been reduced to what amounts to less that a scintilla of evidentiary facts. Were it possible to literally weigh these facts on our proverbial Scales of Justice, an immense disproportion would be demonstrated. Actually, less than 1% is described [42 pages]. I respectfully suggest that the inadequacy of evidence, despite superabundant opportunity for presentation, demands a ponderous, meticulous, fair and just response to the accusatory allegations against Respondent. I therefore maintain that the Board has failed to establish any misconduct by Respondent and I recommend that the charges be dismissed.

CONCLUSION

ACCORDINGLY, having found no basis for the alleged violations by Respondent of Canons 1, 2 and 3 A(4), I recommend dismissal of Charge 1 for the reasons above stated.

CHARGES 2, 3, 4 and 5

I join in the Report filed by my distinguished colleagues, Judge John Kelly, Judge Frank Montemuro, Judge Jessamine S. Jiuliante and recommend dismissal of Charges 2, 3, 4 and 5, as being without basis in law and fact.

In The

Supreme Court of Pennsylvania

JUDICIAL INQUIRY AND REVIEW BOARD

IN RE: JUSTICE ROLF LARSEN

BOARD MATTER NUMBER 140

(Complaint Docket Number 87-156)

APPLICATION FOR DISQUALIFICATION OF ALL MEMBERS OF THE JUDICIAL INQUIRY AND REVIEW BOARD

1. Petitioner, Justice Rolf Larsen, is the respondent at Board Matter Number 40.

2. The Judicial Inquiry and Review Board (hereinafter the Board) is the judicial body created and authorized by the Pennsylvania Constitution, Art. V, section 18 (as implemented by the Pennsylvania Judicial Code, 42 Pa.C.S.A. §§ 3331-34 and Pennsylvania Supreme Court Rules of Procedure Governing The Judicial Inquiry and Review Board Rules 1-24) to receive complaints or reports concerning the conduct of any member of the Pennsylvania Judiciary, to make preliminary investigations as it deems necessary, to file formal charges against any member of the Pennsylvania Judiciary and to convene a formal disciplinary hearing, to compel production of documents and attendance of or testimony by witnesses, to consider, evaluate and weigh all documentary and testimonial evidence,

to act as finders of fact in resolving all issues of fact including the assessment and determination of the credibility of witnesses and resolution of conflicts of testimony, and to recommend to the Supreme Court of Pennsylvania the suspension, removal, discipline or compulsory retirement of any member of the Pennsylvania Judiciary.

3. Currently, and at all times relevant to the within Application For Disqualification, the Board consisted of the following members:

Honorable Bruce W. Kauffman, Chairman
Honorable Frank J. Montemuro, Jr.
Honorable James E. Rowley
Honorable Alex Bonavitacola
Honorable James M. Munley
Honorable Eunice L. Ross
James H. Higgins
Lawrence T. Holye, Jr., Esq.
Antonia L. Scarlata

4. As a judicial body adjudicating disciplinary matters and affecting substantial property interests, proceedings before the Board must comport with all federal and state constitutional due process requirements including the requirement that members of the Judiciary who are respondents to Board proceedings be judged by a fair and impartial tribunal.

5. Where the Board determines that there is not good cause for discipline of a member of the Judiciary, the matter is closed and is not subject to review, and thus, the Board's determinations of issues of credibility are necessarily final in such circumstances.

6. In the history of the Judicial Inquiry and Review Board, where the Board has determined that good cause for discipline exists and has made a recommendation of discipline to the Pennsylvania Supreme Court, that Court has never rejected or reversed the Board on an issue involving the credibility of witnesses, and thus, the Board is, for all practical intents and purposes, the final arbiter of the credibility of witnesses.

A.

7. On May 24, 1988, the Board filed formal charges against respondent charging respondent with two counts of allegedly

improper conduct, thereby instituting formal proceedings against respondent.

8. The Board is a collegial, adjudicatory body which acts as a unit in making its disciplinary recommendations, Pa. Const. Art. V, section 18, and its members may not abstain from voting in a disciplinary matter. Rules Governing The Judicial Inquiry and Review Board, Rule 14.

9. One of the Board's own equal and active members, the Honorable Eunice L. Ross, has been and will be a critical material witness in the Board's proceedings against respondent.

10. Judge Ross's credibility will be attacked and called into question.

11. An adjudicatory tribunal cannot fairly and impartially judge the credibility of one of its own members.

12. Judge Ross has fully participated in the preliminary investigations of this matter, not only as a complaining witness but also as a Board member, and has deliberated with and voted in this matter, which placed her with the majority of the Board.

13. Judge Ross's participation as a complaining witness against respondent and as an equal, active member of the collegial, adjudicatory body which must evaluate her credibility, weigh it and assess it in light of contradictory evidence, and resolve conflicts between her testimony and that of respondent, will deprive respondent of his federal and state constitutional and statutory rights to due process of law, including the right to be judged by a fair and impartial tribunal.

B.

14. In its preliminary investigation of this matter, the Board has attempted to suborn perjury, obstruct justice and intimidate and coerce witnesses into rendering false evidence against respondent; an example of this behavior is demonstrated by the attached copy of a sworn affidavit of Mr. Nickolai Zdrale, marked as Exhibit A, wherein Mr. Zdrale indicates that the Board attempted to force him "into lying about Justice Larsen" and promised that "they could get him out of jail the next day if [he] would say things that [he] already told them were not true about Justice Larsen."

15. Under the federal and state constitutions, no tribunal

which comports itself in such a biased and illegal manner against a respondent is qualified to sit in judgment of that respondent.

C.

16. Former Pennsylvania Supreme Court Justice Bruce W. Kauffman is currently the Chairman of the Judicial Inquiry and Review Board.

17. In 1980, Chairman Kauffman initiated and instigated a lengthy series of articles in the Philadelphia Inquirer accusing respondent of various improprieties and misconduct, which articles lead to initiation of disciplinary proceedings by the Board against respondent at *In The Matter of Justice Rolf Larsen*, Docket No. 78.

18. Respondent was exonerated of all charges filed against him in the aforementioned prior proceedings on May 5, 1983.

19. Chairman Kauffman was a prosecution witness against respondent at the aforesaid prior Board proceedings.

20. Richard A. Sprague, Esquire, was appointed Special Counsel to the Board to handle the investigation and prosecution of respondent at Docket No. 78.

21. Mr. Sprague has rendered a sworn affidavit on June 9, 1988, a copy of which is attached as Exhibit B, setting forth, inter alia, the following information:

> a. That then-Justice Kauffman had furnished the Board with information against respondent;
>
> b. That then-Justice Kauffman actively participated with Mr. Sprague in the preparation of the case against respondent;
>
> c. That then-Justice Kauffman "frequently expressed to [Mr. Sprague] his personal dislike of and his personal antagonism towards Justice Rolf Larsen. . . and told me of his unalterable personal view that Justice Larsen had to be removed from the Supreme Court. . .;"

d. That then-Justice Kauffman had given information detrimental to respondent to the Philadelphia Inquirer because of his (Kauffman's) dislike of respondent and perceived "need for Justice Larsen to be removed from the Supreme Court. . .;"

e. That then-"Justice Kauffman was determined to do everything that was within his power to aid in having Justice Larsen removed from the Supreme Court of Pennsylvania. . .;" and

f. That, in Mr. Sprague's opinion, Chairman Kauffman "could not be fair and impartial in any review of allegations against Justice Larsen. . . and. . . there would clearly be an appearance of impropriety in having Justice Kauffman have any connection with the review of allegations of misconduct by Justice Larsen."

22. Respondent has filed a lawsuit against the Philadelphia Inquirer asserting defamation and other causes of action arising, inter alia, from the aforementioned series of articles published in that newspaper, which lawsuit is still in litigation.

23. Chairman Kauffman currently represents the Philadelphia Inquirer in legal matters as he has in the past.

D.

24. As an Article V judicial body within the judicial system, the Board members, individually and collectively, are governed by the Code of Judicial Conduct. Pa.Const. Art. V, section 18, and Art. V, Schedule to Judiciary Article section 24; Code of Judicial Conduct, *Compliance With The Code of Judicial Conduct* ("Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions. . . is a judge for purposes of this Code.").

25. Due to the participation in this matter to date by Judge Ross and Chairman Kauffman, including participation in investigation, deliberations, conferences and voting, any further participation in this proceeding against respondent by any of the current members of the Board raises serious questions about

the ability of those members to adjudicate this matter in a fair and impartial manner, and violates the following Canons of the code of Judicial Conduct: Canon 1, A Judge Should Uphold the Integrity and Independence of the Judiciary; Canon 2A, "A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;" Canon 2B, "A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment;" Canon 3A(4), "A judge . . . must not consider ex parte communications concerning a pending proceeding;" and Canon 3C(1)(a), "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . ."

26. Participation in this matter by any of the current members of the Board would additionally violate Art. V, section 17 (b) of the Pennsylvania Constitution, which provides:

> Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.

WHEREFORE, as no tribunal can fairly or impartially sit in judgment of part or all of its own credibility; and WHEREFORE, as no tribunal can engage in illegal activity in a matter or proceeding and thereafter fairly or impartially adjudicate that matter or proceeding; and WHEREFORE, as no tribunal can legitimately separate itself into "good parts and bad parts" because the "bad parts" have irrevocably contaminated the whole; and WHEREFORE, for the foregoing reasons, participation in this matter against respondent by the current members of the Board, individually and collectively, has deprived and will continue to deprive respondent of his due process right to a fair hearing before a fair and impartial tribunal and of his civil and constitutional rights under the Constitution of the United States, the Pennsylvania Constitution, and applicable federal and state statutes; respondent requests, therefore, that each and every member of the Board as currently constituted disqualify his or her self from further participation in this matter.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

EXHIBIT A

My name is Nikolai Zdrale and I am relating to John A. Tumolo, Esquire, what happened to me in early February, 1988 while I was confined in the Westmoreland County Jail under a bond of $500,000.00.

Without any request on my part, two men from the Board of Judicial Inquiry and Review came to see me. One was a small, bald headed man, and the other was an older man with gray hair. I gave both of their names to my attorney at that time, James Ashton.

These two men questioned me about the property I sold to Justice Larsen in Ligoneer. I explained that I was in need of money and that the sale to Justice Larsen was a great benefit to me.

I told them that I had only known Justice Larsen to be a completely honorable man, and that I had the most respect for him.

At that point, these men told me that if I would help them get any information that would show Justice Larsen acted improperly, they would help me get out of jail. They wanted me to tell them Justice Larsen did something wrong when I sold the property to him. But I only met the Justice once in my life when I was selling this property to him. I walked the property with him. Even though I am in poor health, and wanted out of jail very badly, I refused to be forced into lying about Justice Larsen.

These men never asked these questions or approached me about them before I was in jail. They tried to get me to say that Justice Larsen had done me a favor for the sale of the property. No such favor was ever asked by me, or done by the Justice. They told me I was lying because I would not sell something for $5,000.00 when I had more money than that into it. I told them the recorded liens made it worth nothing. But that did not seem to matter to them.

They specifically asked me what I was promised by Justice Larsen. I specifically told them I was promised nothing.

Before the trial began in January, 1988 and during the trial Lawrence Clause and Gregory Krepchar both offered me immunity from prosecution and/or a plea bargain if I would "tell them the truth" about how Justice Larsen put the landfill deal together. They also wanted information on Bill Fiore.

This seems important because I saw Messers. Clause and Krepchar talking and laughing in the Courtroom with the same two people who came to see me in jail from the Board of Judicial Inquiry and Review.

When these two men from the Board of Judicial Inquiry and Review came to the Greensburg Jail, they told me my lawyers were ineffective; charged me too much money; I should never have been convicted; and, they could get me out of jail the next day if I would say things that I already told them were not true about Justice Larsen. I have read this statement and swear before a Notary Public that it is true.

NIKOLAI ZDRALE
Nikolai Zdrale

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 23rd DAY
OF February , 1988.

CAROLYN M. DUNMIRE
NOTARY PUBLIC

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

ss

I, RICHARD A. SPRAGUE, ESQUIRE, being duly sworn according to law, depose and state that I am an attorney-at-law, admitted to practice law in the Commonwealth of Pennsylvania. Sometime during the Fall of 1980, I was appointed

Special Counsel to head an investigation into alleged charges of official misconduct on the part of Justice Rolf Larsen in connection with his official duties on the Supreme Court of Pennsylvania. This appointment as Special Counsel was by the then Chief Justice of Pennsylvania, Honorable Henry X. O'Brien, as well as the Judicial Inquiry & Review Board of Pennsylvania.

Shortly after I received the appointment and upon undertaking my duties and responsibilities as Special Counsel in the Larsen matter, I was advised by Richard E. McDevitt, Esquire, then the Executive Director of the Judicial Inquiry & Review Board, that Justice Bruce W. Kauffman, at that time also a Justice of the Supreme Court of Pennsylvania, had furnished Mr. McDevitt information against Justice Larsen relative to the allegations of official misconduct by Justice Larsen that the Judicial Inquiry & Review Board was looking into at that time. Mr. McDevitt suggested that I, as recently appointed Special Counsel in the Larsen matter, personally contact and interview Justice Kauffman in order to investigate and determine in greater detail what information Justice Kauffman possessed regarding the allegations of official misconduct in office by Justice Larsen.

Pursuant to that suggestion by Mr. McDevitt, I did, in fact, personally meet with then Justice Bruce W. Kauffman on numerous occasions during the investigation stages of the proceeding, during preparation for the presentation of testimony at the preliminary hearing in the Larsen matter and during preparation for the final hearing before the Board relative to the formal charges that were, in fact, ultimately filed against Justice Larsen by the Judicial Inquiry & Review Board. During these meetings between Justice Kauffman and myself, I conducted direct face-to-face interviews with him and personally discussed his personal views concerning Justice Larsen as well as what information that he felt that he had that would be helpful to me as Special Counsel in my investigation and presentation of evidence concerning Justice Larsen before the Judicial Inquiry & Review Board.

During the course of those numerous meetings that I had with Justice Kauffman concerning the Larsen matter, Justice Kauffman frequently expressed to me his personal dislike of and his personal antagonism towards Justice Rolf Larsen.

On a number of occasions during these meetings, Justice Kauffman expressed to me his personal disdain for and personal animosity towards Justice Larsen and told me of his unalterable personal view that Justice Larsen had to be removed from the Supreme Court because he (Justice Kauffman) regarded Justice Larsen "as a dangerous person," "as having mental and emotional problems," "as an evil person," etc.

Justice Kauffman indicated to me that because of his dislike of Justice Larsen and because he felt the need for Justice Larsen to be removed from the Supreme Court, he, Justice Kauffman, had given information detrimental to Justice Larsen to The Philadelphia Inquirer.

It was obvious to me that Justice Kauffman was determined to do everything that was within his power to aid in having Justice Larsen removed from the Supreme Court of Pennsylvania. However, it should be noted that although Justice Kauffman was most desirous to be furnishing information against Justice Larsen, when it came time to testify face to face against Justice Larsen, Justice Kauffman did everything he could to avoid that direct confrontation and tried to water down his testimony.

From my contacts with Justice Kauffman, it is my opinion that Justice Kauffman could not be fair and impartial in any review of allegations against Justice Larsen concerning Justice Larsen's conduct on the Supreme Court of Pennsylvania. Furthermore, from my own contacts with Justice Kauffman and in view of what I have stated above, there would clearly be an appearance of impropriety in having Justice Kauffman have any connection with the review of allegations of misconduct by Justice Larsen.

The foregoing statement, consisting of three (3) typewritten pages, has been read by me and the information contained herein is true and correct to the best of my present knowledge, information and belief.

Richard A. Sprague

RICHARD A. SPRAGUE, ESQUIRE

SWORN TO AND SUBSCRIBED
before me this 9th day
of June , 1988.

FREDALEE SHENK
Notary Public

In The

Supreme Court of Pennsylvania

EASTERN DISTRICT

JUSTICE ROLF LARSEN
COMMONWEALTH OF PENNSYLVANIA,
JUDICIAL INQUIRY AND REVIEW
BOARD and its members,
HONORABLE BRUCE W. KAUFFMAN,
HONORABLE FRANK J. MONTEMURO, JR.,
HONORABLE JAMES E. ROWLEY,
HONORABLE ALEX BONAVITACOLA,
HONORABLE JAMES M. MUNLEY,
HONORABLE EUNICE L. ROSS,
JAMES H. HIGGINS, LAWRENCE T.
HOYLE, JR., ANTONIA L. SCARLATA,

Eastern District
Miscellaneous Docket 1988
Docket #138 JIRB

APPLICATION FOR LEAVE TO FILE ORIGINAL PROCESS PURSUANT TO PENNSYLVANIA RULES OF APPELLATE PROCEDURE, RULE 3307

1. Petitioner herein, Justice Rolf Larsen, is the respondent at Board Matter Number 140 before the Judicial Inquiry and Review Board; Justice Larsen has denied all charges filed against him by said Board.

2. Pursuant to Rule 3307 of the Pennsylvania Rules of Appellate Procedure, Justice Larsen files this Application for Leave To File Original Process, i.e., the following original pleadings:

APPLICATION FOR WRIT OF PROHIBITION AND/OR
APPLICATION FOR EXTRAORDINARY RELIEF

APPLICATION FOR STAY OF JUDICIAL INQUIRY
AND REVIEW BOARD PROCEEDINGS PENDING
DISPOSITION OF WITHIN APPLICATIONS
FOR WRIT OF PROHIBITION AND FOR
EXTRAORDINARY RELIEF

Respectfully Submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Justice Rolf Larsen

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings Before the Judicial Inquiry and Review Board, and of the Application for Disqualification of Chief Justice Robert N.C. Nix, Jr. and Justice John P. Flaherty have been served on this date to the parties listed below by first class mail in care of and addressed to Mr. Robert L. Keuch, Esquire, Executive Director and General Counsel of the Judicial Inquiry and Review Board at 225 Market Street, Harrisburg, PA, 17101:

Judicial Inquiry and Review Board
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James E. Rowley
Honorable Alex Bonavitacola
Honorable James M. Munley
Honorable Eunice L. Ross
James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Antonia L. Scarlata

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Justice Rolf Larsen

In The

Supreme Court of Pennsylvania

EASTERN DISTRICT

JUSTICE ROLF LARSEN
v.
COMMONWEALTH OF PENNSYLVANIA,
JUDICIAL INQUIRY AND REVIEW
BOARD and its members,
HONORABLE BRUCE W. KAUFFMAN,
HONORABLE FRANK J. MONTEMURO, JR.,
HONORABLE JAMES E. ROWLEY,
HONORABLE ALEX BONAVITACOLA,
HONORABLE JAMES M. MUNLEY,
HONORABLE EUNICE L. ROSS,
JAMES H. HIGGINS, LAWRENCE T.
HOYLE, JR., ANTONIA L. SCARLATA,

Eastern District
Miscellaneous Docket 1988

APPLICATION FOR WRIT OF PROHIBITION AND/OR
APPLICATION FOR EXTRAORDINARY RELIEF

APPLICATION FOR STAY OF JUDICIAL INQUIRY
AND REVIEW BOARD PROCEEDINGS PENDING
DISPOSITION OF WITHIN APPLICATIONS
FOR WRIT OF PROHIBITION AND FOR
EXTRAORDINARY RELIEF

1. Petitioner, Justice Rolf Larsen, is the respondent at Judicial Inquiry and Review Board Matter Number 140; respondent has denied all charges filed against him by the Judicial Inquiry and Review Board.

2. The Judicial Inquiry and Review Board (hereinafter the Board) is the judicial body created and authorized by the Pennsylvania Constitution, Art. V, section 18 (as implemented by the Pennsylvania Judicial Code, 42 Pa.C.S.A. §§ 3331-34 and Pennsylvania Supreme Court Rules of Procedure Governing The Judicial Inquiry and Review Board Rules 1-24) to receive complaints or reports concerning the conduct of any member of the Pennsylvania Judiciary, to make preliminary investigations as it deems necessary, to dismiss charges as unfounded or to file formal charges against any member of the Pennsylvania Judiciary and to convene a formal disciplinary hearing, to compel production of documents and attendance of or testimony by witnesses, to consider, evaluate and weigh all documentary and testimonial evidence, to act as finders of fact in resolving all issues of fact including the assessment and determination of the credibility of witnesses and resolution of conflicts of testimony, and to exonerate the respondent member of the Pennsylvania Judiciary or to recommend to the Supreme Court of Pennsylvania his or her suspension, removal, discipline or compulsory retirement.

3. Currently, and at all times relevant to the within Application For Disqualification, the Board consists and consisted of the following members:

Honorable Bruce W. Kauffman, Chairman
Honorable Frank J. Montemuro, Jr.
Honorable James E. Rowley
Honorable Alex Bonavitacola
Honorable James M. Munley
Honorable Eunice L. Ross
James H. Higgins
Lawrence T. Holye, Jr., Esq.
Antonia L. Scarlata

4. As a judicial body adjudicating disciplinary matters and affecting substantial property interests, proceedings before the Board must comport with all federal and state constitutional due process requirements including the requirement that members of the Judiciary who are charged with violations of the Code of Judicial Conduct be judged by a fair and impartial tribunal. *Schlesinger Appeal*, 404 Pa. 584, 598, 172 A.2d 835 (1961); *Soja v. Pennsylvania State Police*, 500 Pa. 188, 455 A.2d 613 (1982); *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1976); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

5. Where the Board determines that there is not good cause for discipline of a member of the Judiciary, the matter is closed and is not subject to review, and thus, the Board's determinations of issues of credibility are necessarily final in such circumstances.

6. In the history of the Judicial Inquiry and Review Board, where the Board has determined that good cause for discipline exists and has made a recommendation of discipline to the Pennsylvania Supreme Court, that Court has never rejected or reversed the Board on an issue involving the credibility of witnesses, and thus, the Board is, for all practical intents and purposes, the final arbiter of the credibility of witnesses in such circumstances.

A.

7. The Board is a collegial investigating and adjudicatory body which acts as a unit in making its disciplinary recommendations, Pa. Const. Art. V, section 18, and its members may not abstain from voting in a disciplinary matter. Rules Governing The Judicial Inquiry and Review Board, Rule 14.

8. One of the Board's own equal and active collegial members, the Honorable Eunice L. Ross, has been and will be a critical material witness in the Board's proceedings against respondent.

9. Judge Ross's credibility will be attacked and called into question.

10. An adjudicatory tribunal cannot fairly and impartially judge the credibility of one of its own members.

11. Judge Ross has fully participated in the preliminary investigations of this matter, not only as a complaining witness but also as a Board member, and has deliberated with and voted in this matter, which placed her with the majority of the Board.

12. Judge Ross's participation as a complaining witness against respondent and her position as an equal, active member of the collegial investigatory and adjudicatory body which must evaluate her credibility, weigh it and assess it in light of contradictory evidence, and resolve conflicts between her testimony and that of respondent and other witnesses for respondent, will deprive respondent of his federal and state constitutional and statutory rights to due process of law, including the right to be judged by a fair and impartial tribunal whose impartiality cannot reasonably be questioned.

B.

13. In its preliminary investigation of this matter, the Board has attempted to suborn perjury, obstruct justice and intimidate and coerce witnesses into rendering false evidence against respondent; an example of this behavior is demonstrated by the attached copy of a sworn affidavit of Mr. Nickolai Zdrale, marked as Exhibit A, wherein Mr. Zdrale states that the Board attempted to force him "into lying about Justice Larsen" and promised that "they could get him out of jail the next day if [he] would say things that [he] already told them were not true about Justice Larsen.".

14. Under the federal and state constitutions, no tribunal which comports itself in such a biased and illegal manner against a respondent is qualified to sit in judgment of that respondent.

C.

15. Former Pennsylvania Supreme Court Justice Bruce W. Kauffman is currently the Chairman of the Judicial Inquiry and Review Board.

16. In addition to the authority and powers he holds and exercises as an equal member of the nine-person collegial Board, Bruce W. Kauffman occupies the unique position of Chairman of that Board, which position confers substantial additional authority and powers upon him including, but not limited to, the authority and powers: to unilaterally select the three member hearing committee to conduct formal proceedings against a respondent; to establish schedules for hearings and related proceedings; to grant or deny applications for continuances; and to render other procedural rulings which can and do affect substantive rights of the respondents.

17. In 1980, Chairman Kauffman initiated and instigated a lengthy series of articles in the Philadelphia Inquirer accusing respondent of various improprieties and misconduct, which articles lead to initiation of disciplinary proceedings by the Board against respondent at *In The Matter of Justice Rolf Larsen*, Docket No. 78.

18. Respondent was exonerated of all charges filed against him in the aforementioned prior proceedings on May 5, 1983.

19. Chairman Kauffman was a prosecution witness against respondent at the aforesaid prior Board proceedings.

20. Richard A. Sprague, Esquire, was appointed Special Prosecutor to the Board to handle the investigation and prosecution of respondent at Docket No. 78.

21. Mr. Sprague has rendered a sworn affidavit on June 9, 1988, a copy of which is attached as Exhibit B, setting forth, inter alia, the following information:

a. That then-Justice Kauffman had furnished the Board with information against respondent;

b. That then-Justice Kauffman actively participated with Mr. Sprague in the preparation of the case against respondent;

c. That then-Justice Kauffman "frequently expressed to [Mr. Sprague] his personal dislike of and his personal antagonism towards Justice Rolf Larsen . . . and told me of his unalterable personal view that Justice Larsen had to be removed from the Supreme Court . . .;"

d. That then-Justice Kauffman had given information detrimental to respondent to the Philadelphia Inquirer because of his (Kauffman's) dislike of respondent and perceived "need for Justice Larsen to be removed from the Supreme Court . . .;"

e. That then-"Justice Kauffman was determined to do everything that was within his power to aid in having Justice Larsen removed from the Supreme Court of Pennsylvania . . .;" and

f. That, in Mr. Sprague's present opinion, Chairman Kauffman "could not be fair and impartial in any review of allegations against Justice Larsen . . . and . . . there would clearly be an appearance of impropriety in having Justice Kauffman have any connection with the review of allegations of misconduct by Justice Larsen."

22. Respondent has filed a lawsuit against Chairman Kauffman's client, the defendant Philadelphia Inquirer, and co-defendant Pittsburgh Post-Gazette and Robert B. Surrick (among others), which alleges that these two newspapers, Surrick and others, acting individually and concertedly, libeled respondent, invaded his privacy, cast him in a false light, and otherwise defamed his reputation and character through, inter alia, the series of articles mentioned in paragraph 17 above which were published in the defendant Philadelphia Inquirer and republished in substantially similar form in the co-defendant Pittsburgh Post-Gazette; respondent's lawsuit is pending and active.

23. Chairman Kauffman currently represents the defendant Philadelphia Inquirer in legal matters as he has in the past and this client of Chairman Kauffman (as well as the co-defendants

Pittsburgh Post-Gazette and Surrick) stands to benefit directly from any determination adverse to respondent in the instant Board proceedings since such an adverse determination could impact negatively upon respondent's claim for damages to his reputation in his pending lawsuit.

24. During his term as a member and Chairman of this Board, Chairman Kauffman has actively, directly and indirectly, supported the candidacy of various political candidates for political office, including statewide judicial offices, in clear contravention of Canon 7 of the Code of Judicial Conduct, which provides that an officer of a judicial system performing judicial functions should refrain from political activity inappropriate to his judicial office.

25. In his capacity as Chairman and Board member, Chairman Kauffman has never voted against any member of the judiciary that he has supported for judicial office.

D.

26. The Board is currently investigating charges that have recently been refiled by Robert B. Surrick, Esquire, *see* Exhibit C, in which Surrick has alleged that respondent violated the Code of Judicial Conduct, Canon 3C, by "voting in his own case," namely the "XYZ matter" which Surrick alleges involved the Board's previous *Matter of Justice Rolf Larsen* at Docket No. 78. (The "XYZ matter" was, specifically, the "Application of Robert B. Surrick, a member of the Judicial Inquiry and Review Board concerning 'XYZ,' a certain member of the Judiciary," which was filed with the Supreme Court at No. 72 E.D. Misc. Dkt. 1983 on or about April 28, 1983.)

27. Robert Surrick had previously filed identical charges against respondent with the Board, which charges were dismissed as unfounded on June 16, 1983 by the Board then consisting of nine members different than the current nine members of the Board.

28. The Philadelphia Inquirer, the Pittsburgh Post-Gazette and other publications have published stories and articles stating that Chief Justice Robert N.C. Nix, Jr. and Justice John P. Flaherty were material witnesses in the *Matter of Justice Rolf Larsen* at Board Docket No. 78.

29. The Code of Judicial Conduct specifically prohibits a judge from participating in a matter in which he has personal knowledge of disputed evidentiary facts concerning the matter or where the judge has been a material witness in the

matter, Code of Judicial Conduct Canon 3C 1(a) and (b), the same Canon which respondent has been charged with violating.

30. Obviously, if the "XYZ matter" was, in fact, the *Matter of Justice Rolf Larsen* at Board Docket No. 78, then Chief Justice Nix and Justice Flaherty violated Canon 3C, the same Canon which respondent has been charged with violating, by their participation in and consideration of the "XYZ matter."

31. Neither Chairman Kauffman's client, the defendant Philadelphia Inquirer, co-defendant Pittsburgh Post-Gazette, nor co-defendant Surrick, has ever criticized Chief Justice Nix or Justice Flaherty for participating in a matter in which they had been material witnesses, although these newspapers have vigorously and repeatedly criticized respondent for his alleged participation in the same matter.

32. Chief Justice Nix's participation in and consideration of the "XYZ matter" demonstrates a willful and intentional disregard for Canon 3C of the Code of Judicial Conduct for Chief Justice Nix has publicly stated his belief that the "XYZ matter" was the *Matter of Rolf Larsen* in which he reportedly both participated as a material witness and had personal knowledge of disputed facts. *Application of Surrick*, 504 Pa. 25, 29-32, 470 A.2d 447, 449-50 (1983) (Nix, J., dissenting opinion).

33. Although Chief Justice Nix, by admission, and Justice Flaherty by implication (if the "XYZ matter" was known to Justice Flaherty to be the *Matter of Justice Rolf Larsen*), have violated Canon 3 C(1)(a) and (b) of the Code of Judicial Conduct, the Board has never investigated Chief Justice Nix's or Justice Flaherty's behavior in the "XYZ matter," which behavior violated the very same Canon of the Code of Judicial Conduct which respondent has been charged with violating and which the Board is investigating for a second time; this selective prosecution is further evidence of the Board's bias and prejudice against respondent.

E.

34. In order to safeguard a respondent's right to due process of law in a judicial disciplinary proceeding and to ensure fundamental fairness, it is essential that an adjudicatory disciplinary tribunal avoid commingling of the investigatory/prosecutorial/fact-*gathering* function and the adjudicatory/fact-*finding* function, a problem of constitutional dimension which becomes particularly acute where the same member or

members perform both of these dual functions. *See* paragraph 4 *supra*; *Dussia v. Barger*, 466-Pa. 152, 351 A.2d 667 (1975); *Commonwealth Dep't. of Ins. v. American Bankers Ins. Co.*, 478 Pa. 532, 387 A.2d 449 (1978); *Soja v. Pennsylvania State Police*, 500 Pa. 188, 455 A.2d 613 (1982).

35. Unlike the Disciplinary Board of Pennsylvania which carefully compartmentalizes and separates the functions performed by individual members and employees of the Disciplinary Board to prevent commingling of prosecutorial and adjudicatory functions, the Judicial Inquiry and Review Board system provides no such safeguards and necessarily *requires* commingling of these functions in violation of the state and federal constitutions.

36. Mr. Robert L. Keuch, Esquire, Executive Director and General Counsel to the Board, serves in those capacities as both chief prosecuting officer of the Board as well as chief legal adviser to the Board, dual capacities fraught with the appearance and actuality of improper commingling of prosecutorial and adjudicatory functions in violation of the state and federal constitutions. *See also, State Dental Council and Examining Board v. Pollock*, 457 Pa. 264, 318 A.2d 910 (1980); *Philadelphia Commission on Human Relations v. Gold*, ____ Pa.Cmwlth. ____, 503 A.2d 1120 (1987); *Pennsylvania Human Relations Commission v. Thorp, Reed and Armstrong*, 25 Pa.Cmwlth. 295, 361 A.2d 497 (1976).

37. The Board acts as a collegial body in initiating an investigation, in reviewing alleged facts and evidence through *ex parte* communications with Mr. Keuch and other Board employees operating in an investigating/fact-gathering/prosecutorial role, in deciding to conduct formal proceedings against a respondent based on that *ex parte* information, and in issuing a final adjudication of exoneration or recommended discipline; additionally, the three member hearing panel makes an initial recommendation after hearing evidence, evaluating and weighing testimony, and resolving issues of credibility, and also participates in the final determination of the Board.

38. In fact, present members of the Judicial Inquiry and Review Board have publicly testified that "combining the investigative and adjudicative functions in a single board inevitably creates at least the appearance of unfairness, if not actual unfairness." Report of Governor Casey's Judicial Reform Committee, section 5.9, commentary at pp. 89-90.

F.

39. As an Article V judicial body within the judicial system, the Board members, individually and collectively, are an adjudicative body within the unified judicial system and are governed by the Code of Judicial Conduct. Pa.Const. Art. V, section 18, and Art. V, Schedule To Judiciary Article section 24; Code of Judicial Conduct, *Compliance With The Code of Judicial Conduct* ("Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions . . . is a judge for purposes of this Code.").

40. Due to the participation in this matter to date by Judge Ross and Chairman Kauffman, including participation in investigation, deliberations, conferences and voting, any further participation in this proceeding against respondent by any of the current members of the Board makes it impossible for any of those members to adjudicate this matter in a fair and impartial manner, and violates the following Canons of the Code of Judicial Conduct: Canon 1, A Judge Should Uphold the Integrity and Independence of the Judiciary; Canon 2A, "A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;" Canon 2B, "A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment;" Canon 3A(4), "A judge . . . must not consider ex parte communications concerning a pending proceeding;" and Canon 3C(1)(a), "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . ."

41. Participation in this matter by any of the current members of the Board would additionally violate Art. V, section 17(b) of the Pennsylvania Constitution, which provides:

> Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.

42. On June 15, 1988, respondent filed with the Board an Application for Disqualification of All Members of the Judicial Inquiry and Review Board setting forth many of the grounds

for disqualification set forth herein, which Application requested each and every member of the Board to disqualify him or her self from any further participation in Board Matter Number 140.

43. Immediately after filing said Application For Disqualification, respondent was notified that, after an investigation in excess of one year, formal hearings were to be expedited and were originally scheduled for July 18, 1988 on the minimum allowable notice permitted by the Board's Rule 4 (twenty days).

44. On June 29, 1988, the Board denied respondent's Application for Disqualification (without hearing or oral argument), stating as follows:

> And now, the 29th day of June, 1988, eight members of the Board, excluding Judge Ross, who has been and is excluded from all Board proceedings in this matter, individually and collectively deny Respondent's APPLICATION FOR DISQUALIFICATION OF ALL MEMBERS OF THE JUDICIAL INQUIRY AND REVIEW BOARD requesting that each and every member of the Board disqualify his or her self from further participation in this matter.

45. Formal hearings in this matter have, however, been rescheduled to commence on August 22, 1988 before a three member hearing panel hand-picked by Chairman Kauffman to adjudicate these charges against respondent.

46. Respondent, through counsel, objected to the hastily scheduled hearings and requested a continuance due, inter alia, to the unavailability of many witnesses during the summer vacation months and to counsel's inordinately busy and hectic trial and case schedule of which counsel informed the Board in his written request for a continuance; this request was denied.

47. In refusing respondent's Application For Disqualification, the Board has forced respondent to defend himself against unfounded charges made by one of the Board's own members acting as a complaining witness in proceedings that have been orchestrated and contrived by a Chairman who has sworn a personal vendetta against respondent, and before a Board that has attempted to suborn perjury, obstruct justice and intimidate and coerce witnesses into rendering false testimony against respondent; these circumstances have contaminated and tainted these entire proceedings, demonstrates the Board's bias, hostility and partiality against respondent, and

raises the chilling spectre of an adjudicatory body which has impermissibly commingled its prosecutive and adjudicatory functions and has prejudged the matter against respondent, thus depriving respondent of any semblance of a fair trial. *Judicial Inquiry and Review Board v. Snyder*, 514 Pa. 141. 523 A.2d 294 (1987); *In re Murchinson*, 349 U.S. 133 (1955); *Withrow v. Larkin*, 421 U.S. 35 (1975); *United States v. Ferguson*, 550 F.Supp. 1256 (S.D. N.Y. 1982); *Snyder's Case*, 301 Pa. 276, 152 A. 33(1930); *Commonwealth Dep't. of Ins. v. American Bankers Ins. Co.*, 478 Pa. 532, 387 A.2d 449 (1978); *Commonwealth v. Darush*, 501 Pa. 15, 459 A.2d 727 (1983); *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1975); *Schlesinger Appeal*, 404 Pa. 584, 172 A.2d 835 (1961); *Soja v. Pennsylvania State Police*, 500 Pa. 188, 455 A.2d 613 (1982); *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

WHEREFORE, respondent respectfully requests the following relief:

A. That the Supreme Court assume plenary jurisdiction of this matter under its King's Bench powers, recognized at 42 Pa.C.S. § 502 and Pa.R.A.P. 3309, to correct a grevious abuse of discretion and jurisdiction by the Board in this serious and important matter. *Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County*, 507 Pa. 193, 489 A.2d 1286 (1985) and *Reilly by Reilly v. SEPTA*, 507 Pa. 204, 218, 489 A.2d 1291 (1985);

B. That the Supreme Court grant a writ of prohibition, pursuant to 42 Pa.C.S. § 721(2) and Pa.R.A.P. 3307, prohibiting each and every member of the Board from any further participation in this matter. *Municipal Publications, Inc., supra* and *Glenn Mills Schools v. Court of Common Pleas of Philadelphia County*, 513 Pa. 310, 520 A.2d 1379 (1987);

C. That the Supreme Court declare the proceedings to date null and void and dismiss the charges filed against respondent by the current Board. *Schlesinger Appeal*, 404 Pa. 584, 172 A.2d 835 (1961); *Dussia v. Barger*, 466 Pa. 152. 351 A.2d 667 (1975); *Blenko v. Schmeltz*, 362 Pa. 365, 67 A.2d 99 (1949);

D. That in the event the Supreme Court cannot make a determination on the face of the pleadings before it that the Board is biased, hostile and prejudiced against respondent and has prejudged the matter (respondent submits that the Board's bias, hostility, partiality, attempts to suborn perjury, obstruct justice, etc., are apparent on the pleadings before this Court),

that the Court then exercise its authority under 42 Pa.C.S. § 502, and Pa.Const. Art. V, sections 1 and 10, to specially assign a fair and impartial tribunal to conduct an evidentiary fact-finding hearing. *Municipal Publications, Inc., supra;*

E. That the Supreme Court grant such additional/extraordinary relief as it may deem just and appropriate under the circumstances, including but not limited to the appointment by the Court of five members of the Pennsylvania Judiciary to act as specially presiding members of the Judicial Inquiry and Review Board and to direct the Governor by mandamus or otherwise to appoint two attorneys and two non-attorneys to act as specially presiding members of the Board to investigate and adjudicate the charges against respondent in the fair and impartial manner that has been and will be denied him by proceeding before the Board as it is currently composed. Pa.Const. Art. V, sections 1, 2, 10(a) and (c), Schedule to Art. V, section 24; 42 Pa.C.S. §§ 502 and 503; Pa. Rules of Judicial Administration, Rule 701;

F. That the Supreme Court immediately issue an order staying all proceedings before the Board at Board Matter Number 140.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Justice Rolf Larsen

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

ss:

Before me, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing APPLICATIONS FOR WRIT OF PROHIBITION, EXTRAORDINARY RELIEF and STAY OF JUDICIAL INQUIRY AND

REVIEW BOARD PROCEEDINGS are true and correct to the best of his knowledge, information and belief.

ROLF LARSEN

Rolf Larsen

Sworn to and subscribed
before me this 27th day
of July, 1988.

PAMELA J. McCRACKEN

Pamela J. McCracken
Notary Public

In The

Supreme Court of Pennsylvania

EASTERN DISTRICT

JUSTICE ROLF LARSEN
v.
COMMONWEALTH OF PENNSYLVANIA,
JUDICIAL INQUIRY AND REVIEW
BOARD and its members,
HONORABLE BRUCE W. KAUFFMAN,
HONORABLE FRANK J. MONTEMURO, JR.,
HONORABLE JAMES E. ROWLEY,
HONORABLE ALEX BONAVITACOLA,
HONORABLE JAMES M. MUNLEY,
HONORABLE EUNICE L. ROSS,
JAMES H. HIGGINS, LAWRENCE T.
HOYLE, JR., ANTONIA L. SCARLATA,

Eastern District
Miscellaneous Docket 1988

APPLICATION FOR DISQUALIFICATION OF
CHIEF JUSTICE ROBERT N.C. NIX, JR.
AND JUSTICE JOHN P. FLAHERTY
FROM PARTICIPATION AND
CONSIDERATION OF RESPONDENT'S
APPLICATION FOR WRIT OF PROHIBITION,
APPLICATION FOR EXTRAORDINARY RELIEF,
AND APPLICATION FOR STAY

1. Petitioner herein, Justice Rolf Larsen, is the respondent at Board Matter Number 140 before the Judicial Inquiry and Review Board (hereinafter the Board); respondent has denied all charges filed against him by the Judicial Inquiry and Review Board.

2. Simultaneous to the filing of the instant Application for Disqualification, respondent has filed with the Supreme Court an Application for Writ of Prohibition, Application for Extraordinary Relief and Application for Stay of Proceedings, which Applications are incorporated by reference as if set forth fully herein.

3. Both Chief Justice Robert N.C. Nix Jr. and Justice John P. Flaherty have had *ex parte* communications with various members of the Board concerning the charges and proceedings against respondent at Board Matter Number 140.

4. Justice Flaherty has a close, personal relationship with the principal complaining witness in the instant proceedings at Board Number 140, Judge Eunice L. Ross, herself a Board member.

5. Justice Flaherty has a close, personal relationship with Chairman Bruce W. Kauffman, and has stayed as a guest at Chairman Kauffman's vacation home on the New Jersey shore.

6. Chief Justice Nix has a close, personal relationship with Chairman Kauffman.

7. Chief Justice Nix's son has been employed in the Philadelphia law firm of Dilworth, Paxson, Kalish and Kauffman of which Chairman Kauffman is a senior partner.

8. Chairman Kauffman's son has been employed by Chief Justice Nix.

9. As set forth in respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings, Chief Justice Nix and Justice Flaherty have personal knowledge of disputed evidentiary facts that will be at issue in these proceedings.

10. As set forth in respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings, paragraphs 26-33, both Chief Justice Nix and Justice Flaherty have received preferential treatment from the Board in not being investigated for violations of Canon 3C of the Code of Judicial Conduct, and have a personal Interest therefore in not offending the members of the Board and a personal interest in the outcome of these proceedings.

11. Both Chief Justice Nix and Justice Flaherty will be subpoenaed as material witnesses in these proceedings.

12. Having engaged in *ex parte* communications with various members of the Board concerning these proceedings, having personal knowledge of disputed evidentiary facts, having received preferential treatment in not being investigated for violations of Canon 3C of the Code of Judicial Conduct, being

material witnesses who will be subpoenaed to testify in these proceedings, and in light of their close, personal relationships with Chairman Kauffman and Judge Ross, Chief Justice Nix and Justice Flaherty will not be able to adjudicate respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings in a fair and impartial manner and are disqualified from participation or consideration of said Applications because their "impartiality might reasonably be questioned" because they have "personal knowledge of disputed evidentiary facts concerning the proceeding," because they will be material witnesses concerning the proceeding, because they have an "interest that could be substantially affected by the outcome of the proceeding," and because they have been privy to *ex parte* communications from and with Board members concerning Board Matter Number 140. Code of Judicial Conduct, Canons 3C(1) and 3A(4); *Judicial Inquiry and Review Board v. Snyder*, 514 Pa. 141, 523 A.2d 294 (1987).

WHEREFORE, respondent requests Chief Justice Robert N. C. Nix Jr. and Justice John P. Flaherty to disqualify themselves from participation in or consideration of respondents' Application for Writ of Prohibition, for Extraordinary Relief, and for Stay of Proceedings.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Justice Rolf Larsen

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

ss:

Before me, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing APPLICATION FOR DISQUALIFICATION OF CHIEF JUSTICE ROBERT N.C. NIX, JR. AND JUSTICE JOHN P. FLAHERTY are true and correct to the best of his knowledge, information and belief.

ROLF LARSEN
Rolf Larsen

Sworn to and subscribed
before me this 27th day
of July, 1988.

PAMELA J. McCRACKEN
Pamela J. McCracken
Notary Public

In The

Supreme Court of Pennsylvania
Eastern District

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA,
JUDICIAL INQUIRY AND REVIEW BOARD,
and its members,
HONORABLE BRUCE W. KAUFFMAN,
HONORABLE FRANK J. MONTEMURO, JR.
HONORABLE JAMES E. ROWLEY,
HONORABLE ALEX BONAVITACOLA,
HONORABLE JAMES M. MUNLEY,
HONORABLE EUNICE L. ROSS,
JAMES H. HIGGINS,
LAWRENCE T. HOYLE, JR.,
ANTONIA L. SCARLATA

No. 138
Judicial Inquiry and Review Board Docket

ORDER

PER CURIAM:

AND NOW, this 12th day of August, 1988, upon consideration of the Application for Writ of Prohibition and/or for Extraordinary Relief, Application for Stay of Judicial Inquiry and Review Board Proceedings and Brief in Opposition to the Application of The Honorable Rolf Larsen for Writ of Prohibition and/or Extraordinary Relief, the Applications are hereby denied.

Mr. Justice Larsen did not participate in the consideration or decision of this matter.

In The

Supreme Court of Pennsylvania
Eastern District

JUSTICE ROLF LARSEN
v.
COMMONWEALTH OF PENNSYLVANIA,
JUDICIAL INQUIRY AND REVIEW BOARD,
and its members,
HONORABLE BRUCE W. KAUFFMAN,
HONORABLE FRANK J. MONTEMURO, JR.
HONORABLE JAMES E. ROWLEY,
HONORABLE ALEX BONAVITACOLA,
HONORABLE JAMES M. MUNLEY,
HONORABLE EUNICE L. ROSS,
JAMES H. HIGGINS,
LAWRENCE T. HOYLE, JR.,
ANTONIA L. SCARLATA

No. 138
Judicial Inquiry and Review Board Docket

ORDER

AND NOW, this 12th day of August, 1988, the Application for Disqualification of Chief Justice Robert N. C. Nix, Jr., from Participation and Consideration of Respondent's Application for Writ of Prohibition, Application for Extraordinary Relief, and Application for Stay is denied.

ROBERT N.C. NIX, JR.

Chief Justice Robert N. C. Nix, Jr.

In The

Supreme Court of Pennsylvania
Eastern District

JUSTICE ROLF LARSEN
v.
COMMONWEALTH OF PENNSYLVANIA,
JUDICIAL INQUIRY AND REVIEW BOARD,
and its members,
HONORABLE BRUCE W. KAUFFMAN,
HONORABLE FRANK J. MONTEMURO, JR.
HONORABLE JAMES E. ROWLEY,
HONORABLE ALEX BONAVITACOLA,
HONORABLE JAMES M. MUNLEY,
HONORABLE EUNICE L. ROSS,
JAMES H. HIGGINS,
LAWRENCE T. HOYLE, JR.,
ANTONIA L. SCARLATA

No. 138
Judicial Inquiry and Review Board Docket

ORDER

AND NOW, this 12th day of August, 1988, the Application for Disqualification of Justice John P. Flaherty from Participation and Consideration of Respondent's Application for Writ of Prohibition, Application for Extraordinary Relief, and Application for Stay is denied.

JOHN P. FLAHERTY
Justice John P. Flaherty

92-1833

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, JUSTICE OF THE
PENNSYLVANIA SUPREME COURT

HONORABLE ROLF LARSEN, PETITIONER

APPENDIX II

PAGES 184 – 287

Rolf Larsen, Pro Se
2800 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 565-3000

10PT

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In The

Supreme Court of Pennsylvania

JUDICIAL INQUIRY AND REVIEW BOARD

IN THE MATTER OF
THE HONORABLE ROLF LARSEN

Board Matter Number 140

NOTICE TO PLEAD

You are hereby notified to file a written response (answer) to the averments set forth in the enclosed Omnibus Supplemental Application within twenty (20) days from service hereof. Failure to file such a written response (answer) to said averments set forth in the Omnibus Supplemental Application within twenty (20) days shall be deemed to be an admission of the averments set forth therein and a stipulation that respondent is entitled to the relief requested.

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

In The

Supreme Court of Pennsylvania

IN THE MATTER OF
THE HONORABLE ROLF LARSEN

Board Matter Number 140

SUPPLEMENTAL OMNIBUS APPLICATION

APPLICATION TO QUASH ADDITIONAL FORMAL CHARGES III, IV AND V; APPLICATION FOR STAY OF PROCEEDINGS OR FOR DISMISSAL; APPLICATION TO SEVER CHARGES; APPLICATION FOR DISMISSAL OF CHARGES III, IV AND V FOR LACK OF SPECIFICITY OR, ALTERNATIVELY, FOR MORE SPECIFIC CHARGES OR FOR A PLEADING IN THE NATURE OF A BILL OF PARTICULARS; APPLICATION TO DISMISS ORIGINAL CHARGES I AND II ON GROUNDS OF DOUBLE JEOPARDY; APPLICATION TO DISMISS ALL CHARGES ON GROUNDS OF PROCECUTORIAL MISCONDUCT; APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO "AMENDED/ REAPPROVED CHARGES" III, IV, and V

1. Justice Rolf Larsen is the respondent at Judicial Inquiry and Review Board Matter 140.

2. On May 24, 1988, following preliminary investigation and notice to respondent mandated by Rule 1 of the Rules of Procedure Governing the Judicial Inquiry and Review Board (hereinafter Rules), the Board filed a Notice of Institution of Formal Proceedings against respondent charging him with two counts of allegedly improper conduct.

3. These two charges alleged, in essence: Charge I - that

respondent violated Canons 1, 2 and 3A(4) of the Code of Judicial Conduct by engaging in an *ex parte* communication with Judge Eunice Ross, a member of this Board, regarding a matter involving attorneys Robert O. Lampl and James Ashton, the latter of whom had a personal relationship with respondent and handled a real estate transaction wherein respondent purchased "approximately 38 acres of land in Fairfield Township, Westmoreland County" from Nikolai Zdrale; Charge II - that respondent violated Canons 1 and 2 "by his conduct in pursuing an appeal of zoning variances granted" to real estate developer Frank DePlacido and in pursuing a financial settlement to withdraw his appeal.

4. Hearings on these charges were originally scheduled to commence on July 18, 1988.

5. Counsel for respondent strenuously opposed this hearing schedule as a sudden "rush to judgment" after the Board took over a year to investigate and prepare its case, because it was an inconvenient time (summer vacation schedule) to interview witnesses and arrange for their appearances, because respondent's official duties as a member of the Pennsylvania Supreme Court at that time interfered with his ability to adequately prepare for a July 18, 1988 hearing, and because pretrial motions had yet to be disposed of, including respondent's Application for Disqualification of All Members of the Judicial Inquiry and Review Board which Application and Board Response is incorporated herein by reference.

6. A continuance was granted and hearings were scheduled to commence on August 22, 1988 before a three-member hearing committee consisting of the Honorable Alex Bonavitacola (designated Chairman of said committee), Mr. James H. Higgins, and Mr. Lawrence T. Hoyle, Jr., Esquire.

7. On August 16, 1988, citing personal reasons and expanded duties in connection with an organization of Pennsylvania judges, Judge Bonavitacola resigned from the Board some four and one-half months before his term of office would have naturally expired on January 1, 1989; the vacancy created by Judge Bonavitacola's sudden resignation has not been filled to date by the appointing body, the Pennsylvania Supreme Court.

8. Following requests by counsel for respondent for all

"*Jencks*" (*Jencks v. United States*, 353 U.S. 657 (1957)) and "*Brady*" (*Brady v. Maryland*, 373 U.S. 83 (1963)) material in the possession of Board Counsel, and the Board Counsel's partial compliance with this request, hearings did, in fact, commence on August 22, 1988 in Harrisburg.

9. The Honorable James E. Rowley was designated as Chairman of the hearing committee, but recused himself on August 22, 1988 upon request when it became apparent (from certain "*Brady*" material belatedly turned over to counsel for respondent on the literal eve of trial) that Judge Rowley would become a material witness in this proceeding as he had rendered a statement exculpatory to respondent in his interview with Board investigators flatly contradicting Board witness Judge Ross' statements on certain critical points.

10. The Honorable James M. Munley was then appointed to and designated the Chairman of the hearing committee, and the evidentiary hearing commenced on August 23, 1988.

11. Evidentiary hearings continued at Board Matter Number 140 and, to date, have produced 13 days of hearings, 13 witnesses for the Board, 16 witnesses for respondent, 45 exhibits for the Board, 41 exhibits for respondent, and 2037 pages of notes of testimony.

12. The last day of evidentiary hearings in Board Matter Number 140 was on September 14, 1988; recess was declared by the hearing committee and hearings were subsequently scheduled to recommence on October 5, 1988.

13. On October 3, 1988, the Board filed a pleading captioned "Amendment To Charges For Formal Proceedings" (hereinafter "Amended Charges") at Board Matter Number 140 setting forth three additional charges, III, IV and V, alleging that respondent violated Canons 1, 2 and 3A(4) by engaging in *ex parte* communications with Judge Emil Narick, then of the Court of Common Pleas of Allegheny County in 1984, 1985 and 1986 concerning certain named and unnamed cases pending in his court.

14. Counsel for respondent received these so-called "Amended Charges" by hand-delivery in his office late in the day on October 3, 1988, and respondent received a copy of these charges by express mail delivered to his office on October 4, 1988.

15. Neither respondent nor counsel had been previously notified of, or were in any way aware of, an investigation into respondent's conduct in re Judge Narick.

16. The so-called "Amended Charges" of October 3, 1988, were signed by Mr. Robert L. Keuch, Esquire, and were accompanied by a letter of Mr. Keuch which stated as follows:

> Enclosed are Amended Charges to the Formal Charges that were previously served upon you.
>
> *These charges* are based upon information and evidence very recently obtained during our investigation into these matters and *are served upon you pursuant to Rule 8 of the Board's Rules of Procedure*.
>
> *Pursuant to Rule 8, an answer to these amended charges shall be filed on or before October 7, 1988.* (Emphasis supplied).
>
> [(End of letter)
> (Signature of Mr. Keuch)]

17. Rule 9 provides:

> AMENDMENTS TO NOTICE OR ANSWER
>
> The Board, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

18. By Mr. Keuch's letter of October 3, 1988, the Board and Board Counsel set a time of three days from date of service upon respondent within which to file a written answer to the

so-called "Amended Charges."

19. On October 5, 1988, a telephone conference was held before the hearing committee at Board Matter Number 140 (Judge Munley, and Messrs. Higgins and Hoyle) at which counsel for respondent strenuously objected to the filing of the so-called "Amended Charges" and the consolidation of said Charges III, IV and V with original Charges I and II on various grounds, including: that the so-called "Amended Charges" were not Amendments permissible under Rule 8, but rather were entirely new charges which did not arise out of the proceedings at Board Matter Number 140 in any way; that these charges should therefore have been filed, if at all, as Rule 2 charges, preceded and accompanied by all of the procedural mechanisms and safeguards required by Rules 1-4; that the three days given respondent to prepare and file an answer to said charges was manifestly *per se* unreasonable, and rendered more manifestly unreasonable in light of the facts that the charges are vague and factually deficient, would require extensive investigation and preparation by counsel for respondent and because respondent and counsel live across the Commonwealth from each other and were both in the midst of intensive preparation for the October 5, 1988 scheduled hearings on Board Matter Number 140; and that the October 3, 1988 orders of the Board and Board Counsel were null and void because, inter alia, they were not adopted by a majority of the members of the Board as required by the Pennsylvania Constitution, Article V, section 18(b), the Consolidated Statutes, 42 Pa.C.S. § 2103 and Board Rules 14.

20. A review of the so-called "Amended Charges" and of the transcript of the telephone conference of October 5, 1988 discloses that said "Amended Charges" were: (a) not Amendments to the original charges at all, but were rather entirely new and unrelated charges; and (b) were added to the original Formal Charges by a vote of only three Board members, namely Mr. Bruce W. Kauffman, Esquire, Chairman, the Honorable Frank J. Montemuro, Jr., and Mrs. Antonia L. Scarlata.

21. It was agreed at the conclusion of the October 5, 1988 telephone conference to schedule a further telephone conference before the three members of the Board who participated

in the determination on the October 3, 1988 "Amended Charges" to resolve the issues: (1) Were the "Amended Charges" an Amendment to the Original Charges and Notice of the Institution of Formal Proceedings such that Rule 8 procedures would apply, or were they entirely new and unrelated charges such that Rule 2 procedures (and Rule 1-4 procedures) would apply; and (2) if determined to be Rule 8 "Amendments To Notice," what would be a "reasonable time both to answer the amendment and to prepare and present" a defense thereto as required by Rule 8.

22. Following the telephone conference on October 5, 1988, Mr. Keuch gave assurances to respondent and to counsel for respondent that the time for preparing and filing an answer to the so-called "Amended Charges" would be tolled or suspended pending resolution of the above issues and objections raised by respondent.

23. On October 6, 1988, a telephone conference was held before Mr. Kauffman, Judge Montemuro and Mrs. Scarlata at which time counsel for respondent renewed and preserved his various objections to the so-called "Amended Charges" and requested the participation of the entire Board, including the three members of the hearing committee at Board Matter Number 140 and the two Board members who had recused themselves from participation in the pending proceedings at Number 140 (i.e., Judges Rowley and Ross).

24. At the conclusion of the October 6, 1988 telephone conference, the participating Board members agreed to convene the Board En Banc for resolution of the various legal issues and objections regarding the so-called "Amended Charges" of October 3, 1988, and oral argument was scheduled in Philadelphia for October 10, 1988; it was further agreed that Judges Rowley and Ross would be requested to participate in this En Banc session and determination.

25. Counsel for respondent took the position that the factual averments of the so-called "Amended Charges" would not have to be presented to the En Banc panel in order to reach a determination as to the legal issues and objections raised, and that said factual averments should not be presented to the En Banc panel in order to avoid further pollution of the hearing committee (Judge Munley, and Messrs. Higgins and Hoyle)

beyond that which had already occurred when that committee was apprised that "Amended Charges" had been filed against respondent.

26. On October 10, 1988, oral argument was held before an En Banc panel of the Board consisting of Mr. Kauffman, Judge Montemuro, Judge Munley, Mr. Higgins, Mr. Hoyle, and Mrs. Scarlata; Judges Rowley and Ross declined respondent's request to participate in this determination of the legal issues and various objections to the so-called "Amended Charges" and their impact upon the pending proceeding at Board Matter Number 140; the factual averments of the so-called "Amended Charges" were not presented to this En Banc panel during this proceeding of October 10, 1988.

27. The following day, October 11, 1988, the six member panel of the Board issued the following order:

> AND NOW, this 11th day of October, 1988, after hearing argument and after due deliberation, the Board, with six members sitting, unanimously finds that:
>
> 1) The charges filed on October 3, 1988 shall be *deemed to have been filed pursuant to* Judicial Inquiry and Review Board *Rule of Procedure 2 rather than* Judicial Inquiry and Review Board *Rule of Procedure 8. Accordingly, Respondent shall have the right to file a written answer to said charges on or before October 24, 1988.*
>
> 2) The October 3, 1988 charges were correctly and properly issued.
>
> 3) *In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard ab initio by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on that matter.* (Emphasis added).

28. Respondent received a copy of the October 11, 1988 order "deeming" the previously-called "Amended Charges" to have been Rule 2 charges (despite the failure to comply with the mandated Rule 1 procedures which must, by Supreme Court Rule, precede a Rule 2 Notice of Formal Proceedings) on October 12, 1988 by express mail delivery to his office (which service was defective under Rule 2(c)).

29. Respondent now files this Omnibus Supplemental Application supplementing counsel's letter of October 13, 1988 (attached hereto as Exhibit A), in the nature of various pretrial motions and objections to the extraordinary order of October 11, 1988 establishing the contemplated unheard of En Banc hearing *ab initio* before six members of the Board, aborting all of the prior proceedings, and violating numerous procedural and substantive rights of respondent provided by the Constitutions of the United States and of this Commonwealth, the Consolidated Statutes of this Commonwealth, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness and fair play.

I. APPLICATION TO QUASH ADDITIONAL FORMAL CHARGES III, IV AND V

A. Violation of Supreme Court Rules of Procedure

30. As explicitly demonstrated by the so-called "Amended Charges" of October 3, 1988 themselves, by the accompanying letter of Mr. Keuch, and by the transcripts of the proceedings of October 5, 6 and 10, 1988, the "Amended Charges" were filed and served upon respondent "pursuant to Rule 8 of the Board's Rules of Procedure."

31. Despite this explicit (and erroneous) reliance upon Rule 8 as the mechanism for filing the "Amended Charges," the Board's order of October 11, 1988 "deems" the Rule 8 Charges to have been filed as Rule 2 Charges that were "correctly and properly issued." (Hereinafter, Charges III, IV and V that were created by the actions of six members of the Board on October 11, 1988 will be referred to as "Reapproved Charges.")

32. The record does not support the conclusion that "The

October 3, 1988 charges were correctly and properly issued;" to the contrary, the record of the proceedings and documents unequivocally demonstrates that the Board's "Amended Charges" and/or "Reapproved Charges" of October 3 and/or 11, 1988 failed to comply with the Supreme Court's mandated procedures of Rules 1 and 2 that are prerequisites for the filing of a Notice of Formal Proceedings and Formal Charges under Rule 2.

33. The applicable Rules provide, in relevant portions:

Rule 1. PRELIMINARY INVESTIGATION

(a) The Board, of its own volition, or upon receiving a statement not obviously unfounded or frivolous . . . shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. . . .

(b) If, after preliminary investigation, it is felt the complaint warrants further investigation, *the judge shall be notified* of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the Board's own motion, *and shall be afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose. Such notice shall be given by prepaid registered or certified mail* addressed to the judge at his chambers. . . .

Rule 2. NOTICE OF FORMAL PROCEEDINGS

(a) After the investigation has been completed, if *the Board* concludes that formal proceedings should be instituted, *the Board shall* without delay issue a written notice to the judge . . .

(b) The notice *shall specify in ordinary and concise language* the charges . . . and the alleged facts upon which such charges are based, and *shall advise*

the judge of his right to file a written answer to the charges against him within twenty (20) days after service upon him.

(c) The notice *shall be served* upon the judge by mailing, *by prepaid registered or certified mail*, a copy of the notice . . .

RULE 23. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) "Board" means the Judicial Inquiry and Review Board.

(e) *"Shall" is mandatory* and "may" is permissive.

34. On the record, it is undisputed that respondent was never notified prior to October 4, 1988 of any investigation against him in re Judge Emil Narick and was never "afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the Board prior to its determination of "whether formal proceedings should be instituted and a hearing should be held," as mandated by Rule 1(a) and (b).

35. To the contrary, the determination to institute formal proceedings regarding Judge Narick's apparent allegations and to hold a hearing was a fait accompli when respondent received defective notice of same (i.e., by express mail rather than by registered or certified mail) in his chambers on October 4, 1988.

36. Under the mandatory requirements of Rule 1(a) and (b) and Rule 2 adopted by the Pennsylvania Supreme Court, respondent is absolutely entitled to proper notice and a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the entire Board before the Board may make its determination that formal proceedings should be instituted by a Rule 2 Notice of Formal Proceedings and Formal Charges.

WHEREFORE, the failure of both the three member En Banc panel and the six member En Banc panel of the Board to comply with the Supreme Court's Rules of Procedure, namely Rules 1(a), (b) and 2(a), has deprived respondent of significant procedural protections established by said Rules and has deprived respondent of due process and equal protection of law as guaranteed him by the Constitutions of the United States and of this Commonwealth; Charges III, IV and V should, therefore, be quashed.

B. Composition of Judicial Inquiry and Review Board

37. Article V, section 18 of the Pennsylvania Constitution provides, in relevant portion, as follows:

> Suspension, removal, discipline and compulsory retirement
>
> (a) There *shall be a Judicial Inquiry and Review Board having nine members as follows*: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.
>
> (b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. *A vacancy on the board shall be filled by the respective appointing authority for the balance of the term*. The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board *shall act only with the concurrence of a majority of its members*. (emphasis added)

See also 42 Pa.C.S.A. § 2101-03 (implementing and paralleling Article V, section 18).

38. The composition of the Judicial Inquiry and Review Board, established by the Constitution and implemented by the Consolidated Statute, represents an exact and a delicate balance of Superior Court and Common Pleas Court judges, lawyers and laypersons, and explicitly contemplates the full complement of nine members in taking actions, issuing orders and making decisions, since the respective appointing authority at all times is required to fill any vacancy for the remainder of the vacant term of office.

39. It has been admitted throughout these proceedings by Board Counsel and various Board members that there are inherent and inevitable due process dangers of commingling of prosecutorial and adjudicatory functions of the Board, dangers clearly illustrated by the *ex parte* injection by Mr. Keuch of the extraneous and prejudicial "Kenneth Ross" matter into these proceedings. *See* Notes of Testimony, September 12, 1988 at 1204-14, and September 13, 1988 at 1441-96.

40. The constitutional and statutory composition of the Board, consisting of a majority of judges who are professionally trained to and experienced in remaining impartial in judicial proceedings, is one of the safeguards of the Article V, section 18 Judicial Inquiry and Review Board system that could possibly mitigate the dangers recognized and caused by the commingling of prosecutorial and adjudicatory functions.

41. The "Amended Charges" of October 3, 1988 were initially approved and filed by three members of the Board only, consisting of one Superior Court judge, one lawyer and one layperson, and the "Reapproved Charges" of October 11, 1988 were approved by only six members of the Board consisting of one Common Pleas judge, one Superior Court judge, two lawyers and two laypersons.

42. Because Board Counsel chose to inject and mix these entirely distinct and separate charges into the pending proceedings at Board Matter 140 against respondent, Judges Rowley and Ross, material witnesses in Board Matter 140, declined to participate in the determination to institute formal proceedings as to the "Amended Charges" of October 3, 1988, and declined to participate in the October 10, 1988 oral

argument; as noted, Judge Bonavitacola has already resigned as a member of the Board and his office remains vacant.

43. Thus, the delicate mechanism established by Article V, section 18 has been dismantled (i.e., at times three fifths of the judicial members of the Board have not participated in the actions and decisions rendered by "the Board," and at times fully one-third to two-thirds of the entire Board have not participated in the actions and decisions rendered by "the Board"), and determinations detrimental to respondent (i.e., the October 3 and II, 1988 actions and orders) have been made by unconstitutional and illegal panels of the Board.

WHEREFORE, it is submitted that the actions, orders and determinations of October 3 and 11, 1988 rendered by constitutionally and statutorily deficient panels of the Board have deprived respondent of due process and equal protection of law and of the safeguards and protections mandated by the Constitution and Consolidated Statutes mandating the composition of the Board; Charges III, IV and V should, therefore, be quashed.

II. APPLICATION FOR STAY OF PROCEEDINGS OR DISMISSAL

A. Breach of Confidentiality of Proceedings

44. Throughout these proceedings, as demonstrated by testimony and exhibits throughout the record, there have been monumental and continual leaks of confidential information arising within these proceedings, which information has led to numerous inflammatory, prejudicial and highly selective articles being published in the Pittsburgh Post-Gazette and the Philadelphia Inquirer. *See, e.g.* articles of October 8, 1988, attached hereto as Exhibits B and C, and Notes of Testimony, September 14, 1988 at 1660-1701 and Respondent's Exhibits 40A-C.

45. On October 7, 1988, on a television program on WQEX in Pittsburgh wherein Pittsburgh Post-Gazette reporters and editors comment upon newspaper articles and stories, reporter Bill Moushey discussed his upcoming article of October 8, 1988 ("Narick tells of Larsen conduct.") and responded to a

question concerning new Larsen charges filed by the Board with reference to "my (Moushey's) sources on the Board" or words to that effect.

46. Neither respondent nor counsel for respondent have given or leaked any confidential information concerning these proceedings to any member of the media.

47. It is obvious, therefore, that confidential information has been leaked and continues to be leaked to reporters Bill Moushey and/or Dan Biddle of the Philadelphia Inquirer by sources within the Board.

WHEREFORE, it is respectfully requested that all proceedings at Board Matter 140 be dismissed because of the blatant and serious breach of the confidentiality of these proceedings which has irreparably harmed respondent and prejudiced him and has hampered his defense of the charges against him; alternatively, respondent requests these proceedings be stayed pending an evidentiary hearing to determine the source of the leaking of confidential information to the media in violation of the confidentiality of the proceedings mandated by the Constitution.

B. Composition of Judicial Inquiry and Review Board

48. As set forth in the preceding section, the actions of the six member En Banc panel of the Board, and the contemplated hearings *ab initio* before those six members, violate and will violate the constitutional and statutorily mandated composition of the Board.

49. The vacancy created by the resignation of Judge Bonavitacola, whose term of office would have expired on January 1, 1989, has not been filled by the Supreme Court.

50. Additionally, the recusal of Judges Rowley and Ross from all legal and factual matters involving respondent at Board Matter Number 140 has resulted in the *de facto* vacancy, for all practical effects and purposes, of those two judge members of the Board in this matter.

51. Judge Rowley's term of office on the Board expires on December 3, 1988; Judge Ross' term of office on the Board expires on January 1, 1989.

WHEREFORE, as respondent has been and will be deprived of his constitutional and statutory rights to be judged by a full nine member Judicial Inquiry and Review Board consisting of two judges of the Superior Court, three judges of the Courts of Common Pleas, two lawyers and two laypersons, and has been therefore denied due process and equal protection of the laws, respondent requests the remaining participating members of the Board to stay all further proceedings in this matter pending application by the Board to the Supreme Court for the appointment of the appropriate judges to fill the vacancies of Judges Bonavitacola, Rowley and Ross or until after the Supreme Court fills all three said vacancies in due course after expiration of the respective terms of office.

III. APPLICATION TO SEVER CHARGES

A. Charges III, IV and V

52. It is clear that the "Amended/Reapproved Charges" III, IV and V could not be filed as Rule 8 amendments to the pending proceedings at Board Matter Number 140 because said charges did "not conform to proof or . . . set forth additional facts" developed at said proceedings.

53. Charges III, IV and V concern allegations made by Judge Narick of unrelated and completely separate *ex parte* communications alleged to have been made by respondent from 1984-1986 allegedly involving separate and distinct parties, dates and cases.

54. Judicial Inquiry and Review Board Proceedings have been determined to be quasi-criminal proceedings. *Matter of Dandridge*, 462 Pa. 67, 74, 337 A.2d 885, 888 (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, 745, 758 (1979).

55. As Judge Munley has stated, the quasi-criminal nature of the instant proceedings "would raise the plethora or the umbrella of all of the protection that would flow to a person in a criminal setting." Notes of Testimony, October 5, 1988 at 1728. *See also* concurring and dissenting opinion of Justice McDermott in *Judicial Inquiry and Review Board v. Snyder*, ____ Pa. ____, 523 A.2d 294, 300-01 (1987) ("The removal of a duly elected judicial officer is a matter of the gravest possible

concern. The exercise of such power must be rounded *at the very least*, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.")

56. The Pennsylvania Rules of Criminal Procedure provide:

> RULE 229. AMENDMENT OF INFORMATION
>
> The court may allow an information to be amended when there is a defect in form, the description of the offense, the description of any person or any property, or the date charged, *provided the information as amended does not charge an additional or different offense.* Upon amendment the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

57. As a quasi-criminal prosecution, the addition of "Amended Charges" III, IV and V to Board Matter 140's Notice of Institution of Formal Proceedings are absolutely prohibited by Pa. Crim. Pro. Rule 229 and caselaw applying Rule 229. *See, e.g., Commonwealth v. Shirey*, 333 Pa. Super. 85, 481 A.2d 1314 (1984), appeal after remand, 343 Pa. Super. 189, 494 A.2d 420 (1985); *Commonwealth v. Gray*, 329 Pa. Super. 347, 478 A.2d 822 (1984).

58. Even in a civil proceeding joinder of entirely new and unrelated causes of action with the original causes of action at this stage of the proceedings would be prohibited and prejudicial. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *see* Pa. R.Civ.Pro. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) and *Lohmiller v. Weidenbaugh*, 302 Pa.Super. 174, 448 A.2d 583 (1982), rev'd on other grounds, 503 Pa. 329, 469 A.2d 578 (1983).

59. The United States Supreme Court has declared that a respondent to a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the respondent are added during disciplinary proceedings based on evidence adduced at said proceedings. *In Re Ruffalo*, 390 U.S. 544 (1968); *a fortiori* charges added to and during a pending

proceeding based upon investigations totally extraneous to the proceeding would deprive the respondent of fair notice and due process per *Ruffalo*.

60. The United States Supreme Court stated in *Ruffalo*, 390 U.S. at 551:

> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 US 1, 33, 18 Led 2d 527, 549, 87 S Ct 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

61. Likewise in the instant proceedings, the manner in which the original charges would have been met (defense strategy, witnesses, pleadings, etc.) could have been and would have been substantially altered had Charges III, IV and V been filed prior to the commencement of this complicated and lengthy proceeding, so that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.*

62. *See also Judicial Inquiry and Review Board v. Fink*, 516 Pa. 208, 532 A.2d 358, 361 (1987). ("We do not address or consider the Board's findings that Respondent attempted to deceive the Board concerning the proffered testimony of the 'mystery witness' because those findings do not concern formal charges made against the Respondent. If the Board wishes to initiate action against the parties involved in the 'mystery witness' episode, *then formal proceedings should be commenced, those charged should be notified of the charges against them, and they should be given an opportunity to prepare a defense and respond to the charges*. For purposes of the adjudication of this case, the 'mystery witness' matter

has no bearing and forms no part of our consideration or rationale.")

63. As noted in paragraph 11 herein, substantial time, energy, financial expense and legal and judicial resources have been expended in defending Charges I and II at Board Matter Number 140, and the respondent's defense was approaching completion.

64. Respondent's defense presentation and strategy has at all times been designed and molded to conform to the original Charges I and II as to which he had been noticed and responded pursuant to Article V, section 18 and the Rules of Procedure Governing The Board.

WHEREFORE, it is submitted that it is manifestly unfair and is a denial of due process, and equal protection, the analogous rules of criminal procedure and fundamental notions of fair play to consolidate Charges III, IV and V with Charges I and II at Board Matter 140, and respondent requests severance of Charges III, IV and V not only from original Charges I and II, but also severance of each Charge III, IV and V to be separately noticed and heard in separate proceedings before the Board following disposition of Charges I and II in Board Matter 140.

B. Charges I and II

65. Original Charges I and II concern allegations and averments of unrelated and completely separate and distinct events and matters which should not be consolidated in a single proceeding as required by the En Banc six member panel's order of October 11, 1988.

WHEREFORE, upon commencement of new hearings *ab initio* of said Charges I and II as contemplated by the order of October 11, 1988, Formal Proceedings regarding said charges should be also severed and prosecuted in separate proceedings.

IV. APPLICATION FOR DISMISSAL OF CHARGES III, IV AND V FOR LACK OF SPECIFICITY OR, ALTERNATIVELY, FOR MORE SPECIFIC CHARGES OR FOR A PLEADING IN THE NATURE OF A BILL OF PARTICULARS

66. The "Reapproved Charges" are insufficient and fail to "specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based," specifically:

(a) Charge III gives no docket number or other citation to *Mercede Center, Inc. v. Equibank, Cook and Caribank* nor does it specify the relevant time frame;

(b) Charge IV gives no case name, no docket number or other citation to "a zoning case involving a business entity named *McDermott Land Company*," nor does it specify the relevant time frame;

(c) Charge V is totally lacking in factual averments in that it fails to identify any relevant time frame for the alleged improper *ex parte* communications regarding "certain tax appeal cases" being "handled by Attorney Leonard Mendelson" other than "at some point" after 1984, and gives neither case names, and no docket numbers, or other citations, nor the names of "particular judges" alleged.

67. Due to the lack of specificity and conciseness in said Charges III, IV and V it is impossible to prepare an intelligent responsive answer to said vague and non-specific charges which are constitutionally deficient in failing to provide adequate notice of the charges against respondent.

WHEREFORE, respondent requests dismissal of Charges III, IV and V for failure to specify the charges and the alleged facts upon which they are based; and in the event said charges are not dismissed, respondent requests more specific charges or for a pleading in the nature of a bill of particulars.

V. APPLICATION TO DISMISS ORIGINAL CHARGES I AND II ON GROUNDS OF DOUBLE JEOPARDY

68. As set forth in paragraph 11 herein, respondent has expended considerable time, energy and personal and financial resources in his defense to the original Charges I and II as to which he received the requisite Notice of Formal Proceedings at Board Matter Number 140.

69. The order of the six member panel of the Board of October 11, 1988 "directs the panel currently hearing Board Matter 140 to suspend hearings on that matter."

70. That order further states that: "3. In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members."

71. Thus, the order of October 11, 1988 *sua sponte* aborts the proceedings at Board Matter Number 140 (in effect, declares a "mistrial") without cause of a necessitous and compelling nature, and compels respondent to stand trial anew despite the time, energy and personal and financial resources he has been forced to expend to date to defend against Charges I and II.

72. It is submitted that respondent was and is prevailing on the merits of Charges I and II, and that the extraordinary, unprecedented and unheard of procedure (never in the history of the Board has a hearing committee of more than three members of the Board been convened) directed by the six member panel of the Board on October 11, 1988 was designed to attempt to ensure the participation of Chairman Kauffman to vote on all of these proceedings (i.e., Counts I-V), based upon the following averments and inferences:

(a) Chairman Kauffman's term of office on the Board will expire on November 15, 1988;

(b) Chairman Kauffman has been asked by respondent to recuse himself from these proceedings due to his demonstrable personal bias, hostility and animosity toward respondent and his "unalterable personal view that Justice Larsen had to be removed from the bench" (*see* affidavit of Richard A. Sprague, Esquire, attached hereto as Exhibit D);

(c) Chairman Kauffman would be relieved of his duties on November 15, 1988 and he would have no further official or authorized participation in the deliberations and determination of these proceedings against respondent, unless he were a member of a hearing committee participating in "any hearing in progress at the end of his term;" *see* Article V, section 18(b); 42 Pa.C.S.A. § 2102(b);

(d) The order of October 11, 1988 "deeming" its void, invalid and unconstitutional action of October 3, 1988 effective as of October 3, 1988 and retroactively setting a time to answer the "deemed" Rule 2 "Reapproved Charges" III, IV

and V by October 24, 1988 (i.e., twenty days from October 3, 1988), allows the Board to set a hearing date on the now "consolidated" charges on or before November 15, 1988 since Rule 4 requires the Board to "give notice of such hearing. . . at least twenty (20) days prior to the date set," but only after the twenty day period within which to file an answer to formal charges has elapsed;

(e) As noted previously, the order of October 11, 1988 "deeming" pseudo-life into the void, invalid and unconstitutional previously-called "Rule 8 Amended Charges," and retroactively "deeming" said charges to have been "correctly and properly issued," deprives respondent of the full time mandated by the Rules and by due process and equal protection by depriving him of the full twenty days required by Rule 2(b) and of the additional time required by Rule 1(b) ("reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose"); the twenty days to file a written answer to charges provided by Rule 2(b) should thus run from October 12, 1988 (date of defective service), and thus November 1, 1988 should have been the absolute minimum time set by the order of October 11, 1988 within which to file a written answer;

(f) Moreover, the order of October 11, 1988 deprives respondent of the time provided by the explicit assurances made by Mr. Keuch on October 5, 1988 that the time for filing a written answer to Charges III, IV and V would be tolled or suspended pending disposition of respondent's objections to said charges;

(g) The illegal and unconstitutional actions and timing discussed in sub-paragraphs (d-f) is designed and intended to "lock-in" Chairman Kauffman to further participate in this matter after the expiration of his term, and further to give Board Counsel a "second bite at the apple" since it was not prevailing on the merits of Charges I and II.

WHEREFORE, it is submitted that the unique, bizarre and unheard of procedure ordered by the six member panel of the Board on October 11, 1988 violates respondent's state and federal constitutional rights not to be twice placed in jeopardy of punishment and prosecution, violates his state and federal constitutional rights to due process and equal protection of

law and to fundamental fairness, deprives respondent of any semblance of fair play and exacerbates the appearance of impropriety that has permeated this proceeding from its inception (*see, e.g.* Respondent's Application For Disqualification of All Board Members which has been incorporated herein by reference and Respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings filed in the Supreme Court of Pennsylvania on July 29, 1988, which Applications and Responses are also incorporated herein by reference); it is respectfully requested, therefore, that Charges I and II be dismissed with prejudice if the order of October 11, 1988 is executed.

VI. APPLICATION TO DISMISS ALL CHARGES ON GROUNDS OF PROSECUTORIAL MISCONDUCT

73. On or about June 15, 1988, respondent filed the aforementioned and incorporated Application for Disqualification of All Members of the Judicial Inquiry and Review Board alleging, inter alia, that:

> participation in this matter against respondent by the current members of the Board, individually and collectively, has deprived and will continue to deprive respondent of his due process right to a fair hearing before a fair and impartial tribunal and of his civil and constitutional rights under the Constitution of the United States, the Pennsylvania Constitution, and applicable federal and state statutes. . .

74. On June 29, 1988. said Application for Disqualification was denied by "eight members of the Board, excluding Judge Ross," and the Order Denying Application For Disqualification was executed by "Robert L. Keuch, Executive Director and General Counsel."

75. On July 27, 1988, respondent filed in the Supreme Court of Pennsylvania, Eastern District, the aforementioned and incorporated Applications for Writ of Prohibition, Extraordinary Relief, and Stay of Judicial Inquiry and Review Board Proceedings alleging, inter alia, that the makeup and composition of

the Board necessarily and improperly results in excessive commingling of prosecutorial and adjudicatory functions including the wearing of "two hats," as prosecutor and adjudicator, by the Executive Director of the Board and its General Counsel, Mr. Keuch.

76. As previously noted, Mr. Keuch has signed orders for and by the Board on numerous occasions, including the granting of a continuance on July 5, 1988; the denying of respondent's Application for Disqualification; the filing of the so-called "Amended Charges" on October 3, 1988; and the setting of a time period of only three days within which to answer said charges. (Relevant documents and letters are attached hereto as Exhibits E-H); thus Board Counsel, the prosecutor for the Board, repeatedly operates in a judicial capacity and performs adjudicative functions.

77. As set forth in paragraph 39 herein and in the Notes of Testimony for September 12-13, 1988 at 1204-14, 1441-96, respondent has been seriously prejudiced in this matter by the presentation by Mr. Keuch of a highly inflammatory, irrelevant extraneous matter to the eight sitting members of the Board, including the three member hearing committee, in the middle of the proceedings at Board Matter Number 140.

78. As demonstrated by these incidents and events, the commingling of prosecutorial and adjudicatory functions, and the constitutional shortcomings inherent in the current Judicial Inquiry and Review Board system have been magnified and exaggerated throughout these proceedings by the unique circumstances of this case peculiar to respondent, to his severe prejudice.

79. As Mr. Keuch stated on October 10, 1988, the "most important reason" for the existence of the Judicial Inquiry and Review Board and the procedures mandated by the Constitution, the Consolidated Statutes, and Board Rules "is to protect the integrity of the judicial system." Notes of Testimony, October 10, 1988 at 76.

80. To date in the proceedings at Board Matter Number 140 (ostensibly designed "to protect the integrity of the judicial system") we have witnessed the following: a sudden "rush to judgment" and hastily scheduled hearings after more than a year of Board investigation; sworn allegations of attempts to

suborn perjury, obstruct justice and coerce witnesses, *see* affidavit of Nikolai Zdrale attached as Exhibit I, with no investigation or efforts by the Board to determine the validity of said allegations or referral to law enforcement agencies; continual and extensive commingling of prosecutorial and adjudicatory functions far beyond those inherent and inevitable in the Judicial Inquiry and Review Board system itself; several discovery violations of "*Jencks*" and "*Brady*" requirements and the rules of fair play; the unnecessary, bad faith introduction of highly prejudicial, irrelevant matter polluting the proceedings beyond repair; one judge member of the Board, designated as Chairman of the hearing committee in this proceeding, inexplicably resigning his office six days before hearings were scheduled to commence, with no replacement forthcoming to fill the vacancy; two judge members of the Board recusing themselves in all matters involving respondent because they are material witnesses as to Charge I only whose testimony flatly contradicts each other's on a key issue of credibility; continual, massive, detailed leaking of confidential information which can only come from the Post-Gazette's and Inquirer's "sources on the Board" without any attempt (such as evidentiary hearings) to discover the source and plug the leak; and now, finally, this extraordinary, unprecedented and unheard of procedure whereby three members of the Board (including Chairman Kauffman who has previously stated he would do everything in his power to have respondent removed from the bench) file vague "Rule 8 Amended Charges" over Mr. Keuch's signature, and thereafter employ the disingenuous legal fiction of "deeming" said charges to have been "Rule 2 charges" even though Rule 2 procedures have been utterly ignored, and setting an illegal and constitutionally deficient period of time within which to file a written answer in order to ensure Chairman Kauffman's continued participation in these proceedings by aborting the extensive proceedings that have already caused enormous expenditures of time, energy, and personal and financial resources to respondent and were proceeding favorably to him, and ordering hearings on consolidated charges *ab initio* before a six member panel of the Board, the first time in history that more than three members of the Board have participated on a hearing committee.

81. Rather than protecting the integrity of the judicial system, the instant proceedings have become a travesty of justice and have deprived and continue to deprive respondent of significant procedural and substantive rights derived from the State and Federal Constitutions, the Pennsylvania Consolidated Statutes, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness, fair play and justice.

WHEREFORE, for all of the foregoing reasons, respondent requests the Judicial Inquiry and Review Board to dismiss all Charges against respondent, with prejudice, on the basis of excessive and impermissible commingling of prosecutorial and adjudicatory functions, prosecutorial misconduct, overreaching and bad faith.

VII. APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO "AMENDED/REAPPROVED CHARGES" III, IV AND V

82. As previously set forth in paragraphs 19 and 37-38, the Board can act "only with the concurrence of a majority of its members" and its members "shall consist of" two Superior Court judges, three Common Pleas judges from different judicial districts, two lawyers and two laypersons. Article V, section 18(a) and (b) of the Pennsylvania Constitution; 42 Pa. C.S.A. sections 2102-03.

83. It is undisputed that the order of October 3, 1988 erroneously purporting to be an "Amendment" to the Formal Charges "pursuant to Rule 8," and attempting to add Charges III, IV and V to Board Matter 140 as "Amended Charges," was acted upon by only three members of the Board consisting of one Superior Court judge, one lawyer and one layperson.

84. Accordingly, the October 3, 1988 action and "Amended Charges" of the Board are unconstitutional, illegal and null and void, and are of no legal effect whatsoever.

85. As set forth more fully in the preceding sections, the order of October 11, 1988 "deeming" the October 3, 1988 "Amended Charges" to have been "correctly and improperly" issued is also unconstitutional, invalid and null and void, as said order of October 11, 1988 violates the state and federal

constitutional requirements of due process of law, the state constitutional and statutory requirements regarding the composition of the Board, and the Rules of Procedure Governing the Judicial Inquiry and Review Board.

86. As set forth more fully in the preceding sections, if the order of October 11, 1988 is upheld by the Board over respondent's objections, then the time set therein for respondent to file a written answer on or before October 24, 1988 to Charges III, IV and V, is manifestly unreasonable, illegal and unconstitutional, for the following reasons:

(a) The order of October 11, 1988 resurrects the eight day period between October 3, 1988 and October 11, 1988, even though the October 3, 1988 "Amended Charges" were and are null and void and of no legal effect whatsoever, and retroactively and illegally posits that eight day period into the twenty day period required by Rule 2(b) within which respondent may file a written answer;

(b) The eight day period between October 3-11, 1988 was consummed by respondent and by counsel for respondent in preparation for and participation in the conferences on October 5, 8 and 10, 1988;

(c) The order of October 11, 1988 ignores and retroactively takes-back the assurances given to respondent and his counsel by Mr. Keuch that the time for filing an answer to the October 3, 1988 Charges III, IV and V would be tolled and suspended pending disposition of respondent's objections and the legal issues concerning same, which resolution (illegal and invalid) did not take place until October 11, 1988.

(d) The order of October 11, 1988 "deeming" the "Amended Charges" of October 3, 1988 to have been "correctly and properly issued" as of October 3 1988 deprives respondent of the additional time allotted and required by Rule 1(b) to afford respondent a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" before the Board may file a Notice of Institution of Formal Proceedings;

(e) The vagueness and lack of specificity of the "Amended/Reapproved Charges" III, IV and V renders it impossible to file an intelligent response to said charges, and requires extensive and intensive research and investigation

merely to determine what cases, times, dates, judges and proceedings to which these nebulous charges refer;

(f) The time necessary and appropriate for the filing of the instant Supplemental Omnibus Application challenging the validity of the October 11, 1988 "Reapproved Charges" and the time which elapses pending disposition of said Application cannot be counted against respondent regarding the twenty days required by Rule 2(b) within which to file a written answer to said charges, *see* Pa. R.Civ.Pro.Rule 1028(d) ("If the preliminary objections are overruled, the objecting party shall have *the right to plead over* within twenty (20) days after notice of the order or within such other time as the court shall fix.");

(g) Additionally, whereas respondent, a member of the Pennsylvania Supreme Court, and his counsel had May-August, 1988, the relatively "slow" summer period for the Court, to prepare an answer and defense to the original Charges I and II, the Court is currently enmeshed in the heart of its "busy" season, having just completed oral arguments and opinion assignments on September 26-30, 1988 in Pittsburgh, and with oral arguments/opinion assignments scheduled in Philadelphia on October 24-28, 1988, December 5-9, 1988, and January 17-20, 1988.

WHEREFORE, in the event that the Board denies respondent's requests for relief set forth herein and upholds the validity of its order of October 11, 1988 over objections, respondent requests an extension of time, at least until February 1, 1989, as of right to file written answer to the "Reapproved Charges" III, IV and V.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

ss:

BEFORE ME, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing SUPPLEMENTAL OMNIBUS APPLICATION are true and correct to the best of his information, knowledge, and belief.

ROLF LARSEN

Rolf Larsen

Sworn to and subscribed
before me this 19th day
of October, 1988.

BERNADETTE M. SEIBERT

Notary Public

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN RE:
The Honorable Rolf Larsen

Board Matter Number 140

ORDER DENYING APPLICATION FOR DISQUALIFICATION

And now, the 29th day of June, 1988, eight members of the Board, excluding Judge Ross, who has been and is excluded from all Board proceedings in this matter, individually and collectively deny Respondent's APPLICATION FOR DISQUALIFICATION OF ALL MEMBERS OF THE JUDICIAL INQUIRY AND REVIEW BOARD requesting that each and every member of the Board disqualify his or her self from further participation in this matter.

For the Judicial Inquiry and
Review Board

ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN RE:
The Honorable Rolf Larsen

Board Matter Number 140

ORDER GRANTING CONTINUANCE

Pursuant to Rule 12 of the Board's Rules of Procedure and in response to Respondent's counsel's letter dated June 24, 1988, which counsel has requested be considered a motion for a continuance, the hearing in this matter scheduled for July 19, 1988 is continued until August 22, 1988 at 9:30 A.M.

For the Judicial Inquiry and
Review Board

ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

JULY 5, 1988

July 5, 1988

cc: The Honorable Rolf Larsen
A. Charles Peruto, Esquire
The Honorable Alex Bonavitacola
James H. Higgins
Lawrence T. Hoyle, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN RE:
The Honorable Rolf Larsen

Board Matter Number 140

NOTICE OF HEARING
(J.I.R.B.R.P. 4)

And now, the 24th day of October, 1988, notice is hereby given to all interested parties that a hearing pursuant to J.I.R.B.R.P.5 shall be held on Monday, November 14, 1988, beginning at 10:00 A.M. in Commonwealth Court, Courtroom Number One, Fifth Floor, South Office Building, Harrisburg, Pennsylvania.

For the Judicial Inquiry and
Review Board

ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

cc: The Honorable Rolf Larsen
A. Charles Peruto, Esquire
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James M. Munley
Mr. James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Mrs. Antonia L. Scarlata

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

NOTICE TO PLEAD

You are hereby notified to file a written response (answer) to the averments set forth in the enclosed Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief. Failure to file such a written response (answer) to said averments set forth in said Applications shall be deemed to be an admission of the averments set forth therein and a stipulation that respondent is entitled to the relief requested.

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

SECOND APPLICATION FOR WRIT OF PROHIBITION AND/OR SECOND APPLICATION FOR EXTRAORDINARY RELIEF

1. Justice Rolf Larsen is the respondent at Judicial Inquiry and Review Board Matter 140.

2. On May 24, 1988, following over one year of preliminary investigation and notice to respondent mandated by Rule 1 of the Rules of Procedure Governing the Judicial Inquiry and Review Board (hereinafter Rules), and after consideration of respondent's response to the Board's inquiries, the Board filed a Notice of Institution of Formal Proceedings against respondent charging him with two counts of allegedly improper conduct.

3. These two charges alleged, in essence: Charge I - that respondent violated Canons 1, 2 and 3A(4) of the Code of

Judicial Conduct by engaging in an *ex parte* communication with Judge Eunice Ross, a member of this Board, regarding a matter involving attorneys Robert O. Lampl and James Ashton, the latter of whom had a personal relationship with respondent and handled a real estate transaction wherein respondent purchased "approximately 38 acres of land in Fairfield Township, Westmoreland County" from Nikolai Zdrale; Charge II - that respondent violated Canons 1 and 2 "by his conduct in pursuing an appeal of zoning variances granted" to real estate developer Frank DePlacido and in pursuing a financial settlement to withdraw his appeal.

4. Hearings on these charges were originally scheduled to commence on July 18, 1988.

5. Counsel for respondent strenuously opposed this hearing Schedule as a sudden "rush to judgment" after the Board took over a year to investigate and prepare its case, because it was an inconvenient time (summer vacation schedule) to interview witnesses and arrange for their appearances, because respondent's official duties as a member of the Pennsylvania Supreme Court at that time interfered with his ability to adequately prepare for a July 18, 1988 hearing, and because pretrial motions had yet to be disposed of, including respondent's Application for Disqualification of All Members of the Judicial Inquiry and Review Board, which Application was denied on June 29, 1988 by "eight members of the Board, excluding Judge Ross," over the signature of Mr. Robert L. Keuch, Executive Director and General Counsel of the Board.

6. A continuance was granted and hearings were scheduled to commence on August 22, 1988 before a three-member hearing committee consisting of the Honorable Alex Bonavitacola (designated Chairman of said committee), Mr. James H. Higgins, and Mr. Lawrence T. Hoyle, Jr., Esquire.

7. On July 29, 1988, respondent filed in the Supreme Court of Pennsylvania, Eastern District, the following Applications: Application For Leave to File Original Process Pursuant to Pennsylvania Rules of Appellate Procedure, Rule 3307; Application for Writ of Prohibition and/or Application for Extraordinary Relief; Application for Stay of Judicial Inquiry and Review Board Proceedings Pending Disposition of Within Applications for Writ of Prohibition and for Extraordinary Relief; said

Applications were assigned JIRB Docket No. 138 by the prothonotary for the Eastern District, and are incorporated herein by reference along with the Board's Response thereto.

8. On August 12, 1988, the Pennsylvania Supreme Court denied the relief requested in said Applications by Per Curiam orders issued without opinion.

9. On August 16, 1988, citing personal reasons and expanded duties in connection with an organization of Pennsylvania judges, Judge Bonavitacola resigned from the Board some four and one-half months before his term of office would have naturally expired on January 1, 1989; the vacancy created by Judge Bonavitacola's sudden resignation has not been filled to date by the appointing body, the Pennsylvania Supreme Court.

10. Following requests by counsel for respondent for all "*Jencks*" (*Jencks v. United States*, 353 U.S. 657 (1957)) and "*Brady*" (*Brady v. Maryland*, 373 U.S. 83 (1963)) material in the possession of Board Counsel, and the Board Counsel's partial compliance with this request, hearings did, in fact, commence on August 22, 1988 in Harrisburg.

11. The Honorable James E. Rowley was designated as Chairman of the hearing committee, but recused himself on August 22, 1988 upon request when it became apparent (from certain "*Brady*" material belatedly turned over to counsel for respondent on the literal eve of trial) that Judge Rowley would become a material witness in this proceeding as he had rendered a statement exculpatory to respondent in his interview with Board investigators flatly contradicting Board witness Judge Ross' statements on certain critical points; (Judge Rowley has, in fact, become a material witness in these proceedings whose testimony flatly contradicts that of Judge Ross on certain critical points).

12. The Honorable James M. Munley was then appointed to and designated the Chairman of the hearing committee, and the evidentiary hearing commenced on August 23, 1988.

13. Evidentiary hearings continued at Board Matter Number 140 and, to date, have produced 13 days of hearings, 13 witnesses for the Board, 16 witnesses for respondent, 45 exhibits for the Board, 41 exhibits for respondent, and 2037 pages of notes of testimony.

14. The last day of evidentiary hearings in Board Matter Number 140 was on September 14, 1988; recess was declared by the hearing committee on that date.

15. Pursuant to discussions between Board Counsel Keuch, the members of the hearing committee, and counsel for respondent, an agreement as to the hearing schedule was established, and the hearings were to be held as follows: hearings were to recommence on Wednesday, October 5, 1988 with the remainder of respondent's defense, which was to be completed that week; on Monday, October 10, 1988, the members of the hearing committee were to make physical viewings of the properties in question regarding Charges I and II, and the remainder of that week was scheduled for rebuttal witnesses for the Board, if any, and surrebuttal witnesses for respondent, if any; the following week of October 17, 1988 was scheduled for any witnesses that the hearing committee would direct to appear and testify; it was expressly contemplated and agreed that the hearings at Board Matter Number 140 would be completed on or before October 21, 1988.

16. Board Counsel Keuch had been informed by counsel for respondent during said discussions regarding the hearing schedule that he, counsel for respondent, was representing a criminal defendant in a major federal trial scheduled to commence on October 24, 1988 in the United States District Court for the Eastern District of Pennyslvania, the Honorable James T. Giles presiding, which trial involves five defendants from New York, four other lawyers from New York, over 100 witnesses listed for trial by the federal prosecutors, and no possibility of continuances.

17. On October 3, 1988, "the Board" filed a pleading captioned "Amendment To Charges For Formal Proceedings" (hereinafter "Amended Charges," a copy of which is attached hereto as Exhibit A) at Board Matter Number 140 setting forth three additional charges, III, IV and V, vaguely alleging that respondent violated Canons 1, 2 and 3A(4) by engaging in *ex parte* communications with Judge Emil Narick, then of the Court of Common Pleas of Allegheny County in 1984, 1985 and 1986 concerning certain named and unnamed cases pending in his court.

18. Counsel for respondent received these so-called

"Amended Charges" by hand-delivery in his office late in the day on October 3, 1988, and respondent received a copy of these charges by express mail delivered to his office on October 4, 1988.

19. Neither respondent nor counsel had been previously notified of, or were in any way aware of, an investigation into respondent's conduct in re Judge Narick.

20. The so-called "Amended Charges" of October 3, 1988, were signed by Mr. Robert L. Keuch, Esquire, and were accompanied by a letter of Mr. Keuch (a copy of which is attached hereto as Exhibit B) which stated as follows:

> Enclosed are Amended Charges to the Formal Charges that were previously served upon you.
>
> *These charges* are based upon information and evidence very recently obtained during our investigation into these matters and *are served upon you pursuant to Rule 8 of the Boards Rules of Procedure.*
>
> *Pursuant to Rule 8, an answer to these amended charges shall be filed on or before October 7, 1988.* (Emphasis supplied).
>
> [(End of letter)
> (Signature of Mr. Keuch)]

21. Rule 8 of the Rules of Procedure Governing the Judicial Inquiry and Review Board (a copy of said Rules are attached hereto as an Appendix) provides:

> AMENDMENTS TO NOTICE OR ANSWER
>
> The Board, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge

shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

22. By Mr. Keuch's letter of October 3, 1988, the Board and Board Counsel set a time of three days from date of service upon respondent within which to file a written answer to the so-called "Amended Charges."

23. On October 5, 1988, a telephone conference was held before the hearing committee at Board Matter Number 140 (Judge Munley, and Messrs. Higgins and Hoyle) at which time counsel for respondent strenuously objected to the filing of the so-called "Amended Charges" and the consolidation of said Charges III, IV and V with original Charges I and II on various grounds, including: that the so-called "Amended Charges" were not Amendments permissible under Rule 8, but rather were entirely new charges which did not arise out of the proceedings at Board Matter Number 140 in any way; that these charges should therefore have been filed, if at all, as Rule 2 charges, preceded and accompanied by all of the procedural mechanisms and safeguards required by Rules 1-4; that the three days given respondent to prepare and file an answer to said charges was manifestly *per se* unreasonable, and rendered more manifestly unreasonable in light of the facts that the charges are vague and factually deficient, would require extensive investigation and preparation by counsel for respondent and because respondent and counsel live across the Commonwealth from each other and were both in the midst of intensive preparation for the October 5, 1988 scheduled hearings on Board Matter Number 140; and that the October 3, 1988 orders of the Board and Board Counsel were null and void because, inter alia, they had not been adopted by "the concurrence of a majority of [the Board's] members" as required by the Pennsylvania Constitution, Article V, section 18(b) ("The board shall act only with the concurrence of a majority of its members"), the Consolidated Statutes, 42 Pa.C.S. § 2103 ("The board shall act only with the concurrence of a majority of its members."), and Board Rule 14, all of which mandate that the Board may take no valid or legitimate action without the concurrence of at least five members (a majority)

of the Board.

24. A review of the so-called "Amended Charges" and of the transcript of the telephone conference of October 5, 1988 discloses that said "Amended Charges" were: (a) not Amendments to the original charges at all, but were rather entirely new and unrelated charges; and (b) were added to the original Formal Charges by a vote of only three Board members, namely Mr. Bruce W. Kauffman, Esquire, Chairman, the Honorable Frank J. Montemuro, Jr., and Mrs. Antonia L. Scarlata.

25. It was agreed at the conclusion of the October 5, 1988 telephone conference to schedule a further telephone conference before the three members of the Board who participated in the determination on the October 3, 1988 "Amended Charges" to resolve the issues: (1) Were the "Amended Charges" an Amendment to the Original Charges and Notice of the Institution of Formal Proceedings such that Rule 8 procedures would apply, or were they entirely new and unrelated charges such that Rule 2 procedures (and Rule 1-4 procedures) would apply; and (2) if determined to be Rule 8 "Amendments To Notice," what would be a "reasonable time both to answer the amendment and to prepare and present" a defense thereto as required by Rule 8.

26. Following the telephone conference on October 5, 1988, Board Counsel Keuch gave assurances to respondent and to counsel for respondent that the time for preparing and filing an answer to the so-called "Amended Charges" would be tolled or suspended pending resolution of the above issues and objections raised by respondent.

27. On October 6, 1988, a telephone conference was held before Mr. Kauffman, Judge Montemuro and Mrs. Scarlata at which time counsel for respondent renewed and preserved his various objections to the so-called "Amended Charges" and requested the participation of the entire Board, including the three members of the hearing committee at Board Matter Number 140 and the two Board members who had recused themselves from participation in the pending proceedings at Number 140 (i.e., Judges Rowley and Ross, *see* paragraph 11, *supra*).

28. At the conclusion of the October 6, 1988 telephone conference, the participating Board members agreed to convene

the Board En Banc for resolution of the various legal issues and objections regarding the so-called "Amended Charges" of October 3, 1988, and oral argument was scheduled in Philadelphia for October 10, 1988; at counsel for respondent's request, it was further agreed that Judges Rowley and Ross would be requested to participate in this En Banc session and determination.

29. Counsel for respondent took the position that the factual averments of the so-called "Amended Charges" would not have to be presented to the En Banc panel in order to reach a determination as to the legal issues and objections raised, and that said factual averments should not be presented to the En Banc panel in order to avoid further pollution of the hearing committee (Judge Munley, and Messrs. Higgins and Hoyle) beyond that which had already occurred when that committee was apprised that "Amended Charges" had been filed against respondent.

30. On October 10, 1988, oral argument was held before a six member En Banc panel of the Board consisting of Mr. Kauffman, Judge Montemuro, Judge Munley, Mr. Higgins, Mr. Hoyle, and Mrs. Scarlata; Judges Rowley and Ross declined respondent's request to participate in this determination of the legal issues and various objections to the so-called "Amended Charges" and their impact upon the pending proceeding at Board Matter Number 140; the factual averments of the so-called "Amended Charges" were not presented to this En Banc panel during this proceeding of October 10, 1988.

31. The following day, October 11, 1988, the six member panel of the Board issued the following order (a copy of which is attached hereto as Exhibit C):

> AND NOW, this 11th day of October, 1988, after hearing argument and after due deliberation, the Board, with six members sitting, unanimously finds that:
>
> 1) The charges filed on October 3, 1988 shall be *deemed to have been filed pursuant to* Judicial Inquiry and Review Board *Rule of Procedure 2 rather than* Judicial Inquiry and Review Board *Rule of Procedure*

8. Accordingly, Respondent shall have the right to file a written answer to said charges on or before October 24, 1988.

2) The October 3, 1988 charges were correctly and properly issued.

3) *In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard ab initio by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on that matter.* (Emphasis added).

32. Respondent received a copy of the October 11, 1988 order "deeming" the previously-called "Amended Charges" to have been Rule 2 charges (despite the failure to comply with the mandated Rule 1 procedures which must, by Supreme Court Rule, precede a Rule 2 Notice of Formal Proceedings) on October 12, 1988 by express mail delivery to his office (which service was defective under Rule 2(c)).

33. By letter of October 12, 1988 to Mr. Keuch (a copy of which is attached hereto as Exhibit D), counsel for respondent expressed his "desire to interview some and perhaps all of the members of the Judicial Inquiry and Review Board."

34. By letter of October 13, 1988 to the Board members and Mr. Keuch (a copy of which is attached hereto as Exhibit E), counsel for respondent made some "observations and requests" concerning "the Board's" order of October 11, 1988, including a request to extend the time set therein (October 24, 1988) for respondent to file a written answer to the new "Reapproved Charges" III, IV and V of October 11, 1988, and a request for a "writing in the nature of a Bill of Particulars" concerning these vague and factually insufficient charges and sought the Board members' and Board Counsel's "advice with a prayer that it be given promptly."

35. On October 20, 1988, Board Counsel Keuch responded to counsel for respondent's letters of October 12th and 13th

with two separate letters, as follows:

a) Response to letter of October 12, 1988 (a copy of which Response is attached hereto as Exhibit F) - The "Board requests that you put such request [to interview Board members] in writing specifying the areas of your inquiry and reasons why such an inquiry is necessary" ... to establish "good cause with specificity for your request;" and

(b) Response to letter of October 13, 1988 (a copy of which Response is attached hereto as Exhibit G) - This letter advises counsel for respondent that on the one hand, "the Board is very concerned about the need to expedite the proceedings against a sitting member of the Judiciary ... particularly ... a member of the highest court." Accordingly, "the Board" denied the request for an extension of time to answer the "Reapproved Charges" III, IV and V. However, on the other hand, said letter of Mr. Keuch "offers" respondent an "extension of time to answer the charges" to November 7, 1988, *but only upon* respondent's "written waiver of the [twenty day] notice hearing requirements of Rule 4" on or before October 24, 1988, in which event, "should hearings be necessary on the ["reapproved"] charges issued October 3, 1988, the hearings will commence on November 9, 1988 at 10:00 a.m.," at which time the Board would consider respondent's requests for "any additional time necessary to prepare the defense...."

36. Respondent and his counsel have attempted to investigate the allegations set forth in the "Reapproved Charges" III, IV and V to the best of their abilities and available resources, but they have been and are substantially handicapped by the vagueness and factual insufficiency of said charges and the illegal and constitutionally inadequate time set by "the Board" within which to file a written answer (the illegality and unconstitutionality of "the Board's" actions, including said time period, will be discussed fully *infra*).

37. On October 24, 1988 at approximately 4:50 p.m., respondent filed with the Board his response to "the Board's" actions and order of October 11, 1988 consisting of an Omnibus Supplemental Application with Notice to Plead attached, and an Application for Stay of All Proceedings at Board Matter Number 140 and Request for Oral Argument (which Applications are incorporated herein by reference) setting forth most (85) of the averments and requests for relief set forth and requested herein; said averments have not been denied.

38. The Omnibus Supplemental Application supplemented counsel for respondent's letter of October 13, 1988 and was an application in the nature of various pretrial motions and objections to the extraordinary order of October 11, 1988 establishing the contemplated unheard of En Banc hearing *ab initio* on consolidated Charges I-V before six members of the Board, aborting all of the prior proceedings, and violating numerous procedural and substantive rights of respondent provided by the due process, equal protection and double jeopardy provisions of the Constitutions of the United States and of this Commonwealth, the Consolidated Statutes of this Commonwealth and of the United States, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness and fair play.

39. Between 1:00 p.m and 2:00 p.m. on October 24, 1988, a courtesy copy of a "Notice of Hearing" was hand delivered to the office of counsel for respondent (who did not, however see said copy until the following morning), which Notice (a copy of which is attached hereto as Exhibit H) provides:

NOTICE OF HEARING
(J.I.R.B.R.P. 4)

> And now, the 24th day of October, 1988, notice is hereby given to all interested parties that a hearing pursuant to J.I.R.B.R.P. 5 shall be held on Monday, November 14, 1988, beginning at 10:00 A.M. in Commonwealth Court, Courtroom Number One, Fifth Floor, South Office Building, Harrisburg, Pennsylvania.

For the Judicial Inquiry and
Review Board
/s/ ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

cc: The Honorable Rolf Larsen
A. Charles Peruto, Esquire
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James M. Munley
Mr. James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Mrs. Antonia L. Scarlata

40. A copy of said Notice of Hearing was mailed by Federal Express at "1840" hours on October 24, 1988 to respondent's chambers in Pittsburgh, and received there at approximately 9:20 a.m. on October 25, 1988 nineteen days prior to the hearing date set by said Notice of November 14, 1988; respondent was in Philadelphia the entire week of October 24-28, 1988 attending an argument session of the Pennsylvania Supreme Court.

41. On October 31, 1988, Board Counsel Keuch issued an order "For the Judicial Inquiry and Review Board" which states "after due deliberation, the Board, with six members sitting, unanimously holds that": all of the request for relief set forth in respondent's Supplemental Omnibus Motion are denied (a copy of said order is attached hereto as Exhibit I).

42. Said order of October 31, 1988 specifically denies respondent's: (1) application for stay of all proceedings; (2) notice to plead (which was quashed without response to the averments set forth in the Supplemental Omnibus Application); (3) request for oral argument; (4) application to quash Charges III, IV and V; (5) application for stay or dismissal of all proceedings; (6) application to sever charges; (7) application to dismiss charges III, IV and V for lack of specificity, or for a bill of particulars; (8) application to dismiss Charges I and II on double jeopardy grounds; (9) application to dismiss all charges on double jeopardy grounds; (10) and request for

extension of time to file a written answer to Charges III, IV and V. (All of these requests are renewed in the instant Second Applications to the Supreme Court which, additionally, raises a claim of denial of respondent's constitutional right to counsel of his own choosing based upon "the Board's" actions of October 24, 1988 setting a hearing date of November 14, 1988 at a time when the Board knew that counsel for respondent was unavailable.)

43. Respondent now files this Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief in the Supreme Court raising various objections and challenges to the illegal, arbitrary, capricious, and unconstitutional actions of Mr. Keuch and/or the En Banc panels of the Board in these proceedings, and in particular the actions of various panels of the Board and Board Counsel on October 3, 11, and 24, and 31, 1988, which Second Applications seek the relief requested herein under the Constitutions of the United States and of this Commonwealth which guarantee respondent due process of law, equal protection of law, the right not to be twice placed in jeopardy of punishment and prosecution for the same offense and the right to counsel, the Consolidated Statutes of this Commonwealth and of the United States, the Rules of Procedure Governing The Judicial Inquiry and Review Board, and traditional notions of fundamental fairness, justice and fair play.

I. APPLICATION TO QUASH ADDITIONAL FORMAL CHARGES III, IV AND V AND TO VACATE THE ACTIONS AND DECISIONS OF "THE BOARD" OF OCTOBER 3, 11 AND 24, 1988

A. Violation of Supreme Court Rules of Procedure-Actions/Decisions of October 3 and 11, 1988

44. As explicitly demonstrated by the so-called "Amended Charges" of October 3, 1988 themselves (Exhibit A), by the accompanying letter of Mr. Keuch (Exhibit B), and by the transcripts of the proceedings of October 5, 6 and 10, 1988, the "Amended Charges" were filed and served upon respondent "pursuant to Rule 8 of the Board's Rules of Procedure."

45. Despite this explicit (and improper) reliance upon Rule 8 as the mechanism for filing the "Amended Charges," "the Board's" order of October 11, 1988 (Exhibit C)"deems" the Rule 8 Charges to have been filed as Rule 2 Charges that were "correctly and properly issued."

46. The record does not support the conclusion that "The October 3, 1988 charges were correctly and properly issued;" to the contrary, the record of the proceedings and documents unequivocally demonstrates that "the Board's" "Amended Charges" and/or "Reapproved Charges" of October 3 and/or 11, 1988 failed to comply with the Supreme Court's mandated procedures of Rules 1 and 2 that are prerequisites for the filing of a Notice of Formal Proceedings and Formal Charges under Rule 2, and also violated the constitutional and statutory requirements that the board can act "only with the concurrence of a majority of its member," i.e. five members, see paragraphs 100-112, *infra*.

47. The applicable Rules provide, in relevant portions:

Rule 1. PRELIMINARY INVESTIGATION

(a) The Board, of its own volition, or upon receiving a statement not obviously unfounded

or frivolous . . . *shall make a preliminary investigation to determine whether formal proceedings should be instituted* and a hearing held. . . .

(b) *If, after preliminary investigation, it is felt the complaint warrants further investigation, the judge shall be notified* of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the Board's own motion, *and shall be afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose. Such notice shall be given by prepaid registered or certified mail* addressed to the judge at his chambers. . . .

Rule 2. NOTICE OF FORMAL PROCEEDINGS

(a) After the investigation has been completed, if *the Board concludes that formal proceedings should be instituted, the Board shall* without delay issue a written notice to the judge . . . .

(b) The notice *shall specify in ordinary and concise language* the charges . . . and the alleged facts upon which such charges are based, and *shall advise the judge of his right to file a written answer* to the charges against him *within twenty (20) days after service upon him.*

(c) The notice *shall be served* upon the judge by mailing, *by prepaid registered or certified mail,* a copy of the notice . . . .

RULE 23. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) "Board" means the Judicial Inquiry and Review Board.

(e) *"Shall" is mandatory* and "may" is permissive.

48. On the record, it is undisputed that respondent was never notified prior to October 4, 1988 of any investigation against him in re Judge Emil Narick and was never "afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the Board prior to its determination of "whether formal proceedings should be instituted and a hearing should be held," as mandated by Rule 1(a) and (b).

49. To the contrary, the determination to institute formal proceedings regarding Judge Narick's apparent allegations and to hold a hearing was a fait accompli when respondent received defective notice of same (i.e., by express mail rather than by registered or certified mail) in his chambers on October 4, 1988.

50. Under the mandatory requirements of Rule 1(a) and (b) and Rule 2 adopted by the Pennsylvania Supreme Court, respondent is absolutely entitled to proper notice and a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the entire Board *before the Board may make its determination* that formal proceedings should be instituted by a Rule 2 Notice of Formal Proceedings and Formal Charges.

WHEREFORE, the failure of both the three member En Banc panel and the six member En Banc panel of the Board to comply with the Supreme Court's Rules of Procedure, namely Rules 1(a), (b) and 2(a), has deprived respondent of significant procedural protections established by said Rules and has deprived respondent of due process and equal protection of law as guaranteed him by the Constitutions of the United States and of this Commonwealth and by the Consolidated Statutes of this Commonwealth and of the United States; Charges III, IV and V should, therefore, be quashed.

B. Violation of Supreme Court Rules of Procedure - Actions/Decisions of October 24, 1988

51. As noted, Rule 2(b) provides that the Notice of Formal Proceedings "shall advise the judge of his right to file a written answer to the charges against him within (20) days after service upon him;" twenty days after service of the invalid October 3, 1988 "Amended Charges" upon respondent expired on October 24, 1988 at midnight, which was also the time set by "the Board's order of October 11, 1988.

52. Rule 4 provides:

SETTING FOR HEARING BEFORE BOARD

After the filing of an answer or upon expiration of the time for the filing, the Board shall order a hearing to be held concerning the charges, which, if sustained, may lead to the suspension, removal, discipline or compulsory retirement of the judge. *The Board shall set a time and place for hearing and shall give notice*

of such hearing by mail to the judge *at least twenty (20) days prior to the date set.*

53. "The Board" did not "order a hearing" and "set the time" for said hearing "*after . . . expiration of the time* for the filing" of the answer (which time was at the earliest, pursuant to "the Board's" order of October 11, 1988, at midnight on October 24, 1988), but rather Board Counsel Keuch issued a Notice of Hearing (Exhibit H) prior to 1:00 p.m. on October 24, 1988, approximately twelve hours before the time for filing the answer to Charges III, IV and V had expired, in violation of Rule 4.

54. Said Notice of Hearing illegally set the time for hearing at 10:00 a.m. on November 14, 1988, and a copy of said Notice of Hearing was received by respondent on October 25, 1988.

55. Rule 4 provides that the judge must be given notice of hearing "at least twenty (20) days prior to the date set" in the notice. The Notice of Hearing of October 24, 1988 sent in this case to respondent (Exhibit H) violates Rule 4 in that it provides only nineteen days notice "prior to the hearing date," as the first day of the twenty day period (October 25th) is excluded from the calculation, *see* Pa. R.Civ.P.Rule 106(a), and the last day to provide a full twenty days notice *prior to the hearing* as required by Rule 4 is, therefore, November 15, 1988.

WHEREFORE, the failure of "the Board" acting through Board Counsel Keuch on October 24, 1988 to comply with the Supreme Court's Rules of Procedure, namely Rules 2(b) and 4, has deprived respondent of significant procedural protections established by said Rules and has deprived respondent of due process and equal protection of law as guaranteed him by the Constitutions of the United States and of this Commonwealth, and by the Consolidated Statutes of this Commonwealth and of the United States; the Notice of Hearing of October 24, 1988 illegally setting a hearing date of November 14, 1988 should, therefore, be vacated.

C. Composition of Judicial Inquiry and Review Board

56. Article V, section 18 of the Pennsylvania Constitution

provides, in relevant portion, as follows:

> Suspension, removal, discipline and compulsory retirement
>
> (a) There *shall be a Judicial Inquiry and Review Board having nine members as follows*: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.
>
> (b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. *A vacancy on the board shall be filled by the respective appointing authority for the balance of the term.* The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board *shall act only with the concurrence of a majority of its members.* (emphasis added)

See also 42 Pa.C.S.A. § 2101-03 (implementing and paralleling Article V, section 18) and Board Rule 14.

57. As set forth previously, the Constitution, Consolidated Statutes and Board Rules mandate, therefore, the affirmative vote of a concurrence of a majority of the Board's members, ie. five members, before any action can legitimately be taken by the Board; anything less is a nullity.

58. The composition of the Judicial Inquiry and Review Board, established by the Pennsylvania Constitution and the Consolidated Statutes, represents an exact and a delicate balance of Superior Court and Common Pleas Court judges, lawyers and laypersons, and explicitly contemplates and mandates the participation by the full complement of nine members in taking actions, issuing orders and making decisions, since the respective appointing authority at all times is required to fill

any vacancy for the remainder of the vacant term of office.

59. It has been admitted throughout these proceedings by Board Counsel and various Board members that there are inherent and inevitable due process dangers of commingling of prosecutorial and adjudicatory functions of the Board, dangers clearly illustrated by the *ex parte* injection by Mr. Keuch of the extraneous and prejudical "Kenneth Ross" matter into these proceedings. *E.g.*, Notes of Testimony, September 12, 1988 at 1204-14, and September 13, 1988 at 1441-96 (copies of which are attached hereto as Exhibit J).

60. Said "Kenneth Ross" matter was injected into the proceedings in the following manner:

(a) On September 9, 1988, Board Counsel Keuch presented, *ex parte*, during a conference call with all eight remaining members of the Board, information that one "Kenneth Ross" had gone to Joel Aaronson, a lawyer who had already testified for the Board in these proceedings, in August of 1988, and allegedly told him (Aaronson) that "Justice Larsen remembers his friends and his enemies, words to that effect." N.T., September 13, 1988 at 1441-42;

(b) Board Counsel Keuch had actual knowledge of this information and allegation prior to the commencement of these proceedings on August 22, 1988;

(c) Board Counsel Keuch stated that he "had absolutely no evidence whatsoever that the respondent was involved in the [Kenneth Ross] contact, encouraged it, had any part whatsoever in the contact," N.T. September 12, 1988 at 1209;

(d) Board Rule 1(c) provides a mechanism for investigating complaints against a member of the judiciary by a two member investigating committee of the Board;

(e) Board Counsel Keuch did not utilize this procedure, of which he was well aware, to investigate these "Kenneth Ross" allegations;

(f) Board Counsel Keuch, instead, chose to inform the "entire" Board (less Judge Bonavitacola) in an *ex parte* telephone conference in the midst of these proceedings that Kenneth Ross had stated that Justice Larsen remembers his friends and enemies, thus prejudicing respondent by improperly intimating, without any factual basis whatsoever, that respondent had participated in tampering with a Board

witness;

(g) The "Kenneth Ross" matter was then, at the direction of the eight members of the Board, referred to law enforcement authorities for criminal investigation of Mr. Ross' alleged behavior.

61. Due to the pollution and contamination of the hearing committee caused by the deliberate *ex parte* injection into the proceedings of the irrelevant and extremely prejudicial "Kenneth Ross" matter by Board Counsel Keuch, counsel for respondent moved for a mistrial on September 13, 1988, Notes of Testimony at 1441-1463, which motion was denied by the hearing committee.

62. In contrast to this handling of the "Kenneth Ross matter," the hearing committee, at the insistence of Board Counsel Keuch, has refused to allow respondent to impeach the credibility of one of the Board's principal witnesses against respondent, Frank DiPlacido (the principal, active member of Highpointe Associates, the proposed developers of the condominium project which is the subject of Charge II), by use of this witness' 1981 felony convictions for his participation as a principal member of a nationwide criminal conspiracy to distribute substantial quantities of cocaine through the Federal Express system, even though said convictions are admissible to impeach the credibility of a witness in this Commonwealth. *See* Respondent's Memorandum of Law, a copy of which is attached hereto as Exhibit K. The hearing committee has directed that DiPlacido's prior felony convictions cannot be used to impeach his credibility and have ordered all references to said convictions be striken from the record, thus insulating the non- hearing committee members of The Board from "contamination" by this information.

63. Thus, while respondent is improperly and erroneously denied the opportunity to impeach the credibility of his accuser by use of actual felony convictions for crimes reflecting on the witness' integrity and veracity, and the hearing committee takes pains to insulate the record from this information, respondent is prejudiced and damaged by Board Counsel's deliberate, improper *ex parte* injection into these proceedings of irrelevant and extremely prejudicial allegations attempting without foundation to link him inferentially to possible witness

tampering.

64. The constitutional and statutory composition of the Board, consisting of a majority of judges who are professionally trained to and experienced in remaining impartial in judicial proceedings, and the constitutional and statutory requirement that the Board shall only act with the concurrence of a majority of its members, are safeguards of the Article V, section 18 Judicial Inquiry and Review Board system that could possibly mitigate the dangers recognized and caused by the commingling of prosecutorial and adjudicatory functions.

65. The "Amended Charges" of October 3, 1988 were initially approved and filed by three members of the Board only, consisting of one Superior Court judge, one lawyer and one layperson; the "Reapproved Charges" of October 11, 1988 were approved by only six members of the Board consisting of one Common Pleas judge, one Superior Court judge, two lawyers and two laypersons; and the Notice of Hearing of October 24, 1988 was, on its face, issued only by Mr. Keuch, the prosecutor for the Board; the order of October 31, 1988 was issued by only six members of the Board consisting of one Common Pleas judge, one Superior Court judge, two lawyers and two laypersons.

66. Because Board Counsel Keuch, improperly and *ex parte*, chose to inject and mix these entirely distinct and separate Charges III, IV and V into the pending proceedings at Board Matter 140 against respondent, Judges Rowley and Ross, material witnesses in Board Matter 140, declined to participate in the determination to institute formal proceedings as to the "Amended Charges" of October 3, 1988, and declined to participate in the October 10, 1988 oral argument; as noted, Judge Bonavitacola has already resigned as a member of the Board and his office remains vacant.

67. Thus, the delicate mechanism established by Article V, section 18 has been dismantled (i.e., at times three fifths of the judicial members of the Board have not participated in the actions and decisions rendered by "the Board," and at times fully one-third to two-thirds of the entire Board have not participated in the actions and decisions rendered by "the Board," and, at times, actions and decisions of "the Board" have been rendered solely by Mr. Keuch, the prosecutor for the Board),

and determinations detrimental to respondent (i.e., the October 3, 11, 24, and 31, 1988 actions and orders) have been made by unconstitutional and illegal panels of the Board or its prosecutor.

WHEREFORE, it is submitted that the actions, orders and determinations of October 3, 11, 24, and 31, 1988 rendered by constitutionally and statutorily deficient panels of the Board and/or its prosecutor have deprived respondent of due process and equal protection of law and of the safeguards and protections mandated by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth; Charges III, IV and V should, therefore, be quashed, and "the Board's" actions and orders of October 3, 11, and 24, 1988 should be vacated.

II. APPLICATION FOR STAY OF PROCEEDINGS OR DISMISSAL

A. Breach of Confidentiality of Proceedings

68. Throughout these proceedings, as demonstrated by testimony and exhibits throughout the record, there have been monumental and continual leaks of confidential information arising within these proceedings, which information has led to numerous inflammatory, prejudicial and highly selective articles being published in the Pittsburgh Post-Gazette and the Philadelphia Inquirer. *See, e.g.* articles of October 8, 1988, attached hereto as Exhibits L and M, and Notes of Testimony, September 14, 1988 at 1660-1701 and Respondent's Exhibits 40A-C.

69. On October 7, 1988, on a television program on WQEX in Pittsburgh wherein Pittsburgh Post-Gazette reporters and editors comment upon newspaper articles and stories, reporter Bill Moushey discussed his upcoming article of October 8, 1988 ("Narick tells of Larsen conduct.") and responded to questions concerning new Larsen charges filed by the Board with reference to "my (Moushey's) sources on the Board" and to information obtained from "a Board member."

70. On October 26, 1988, the Philadelphia Inquirer, over the by-line of Daniel R. Biddle, published an article entitled "Inquiry is unfair, says Larsen" (a copy of which is attached

hereto as Exhibit N) wherein selected portions of respondent's Supplemental Omnibus Application were quoted and discussed.

71. Said Supplemental Omnibus Application was hand-delivered to the offices of the Board in Harrisburg at approximately 4:50 p.m. October 24, 1988 in sealed envelopes marked personal and confidential to the eight remaining members of the Board and to Mr. Keuch.

72. Said Philadelphia Inquirer article of October 26, 1988 states, inter alia: "In confidential papers filed Monday with the Judicial Inquiry and Review Board...." and "A copy of [Larsen's Application] was obtained last night by the Inquirer."

73. Neither respondent nor counsel for respondent have given or leaked any confidential information concerning these proceedings to any member of the media; on the other hand, the Board, through its Counsel, has advocated in the Supreme Court a position supporting the leaking of confidential information to the media by the lawyer members of the Board. *See Office of Disciplinary Counsel v. Surrick*, No. 508 Disc. Dkt. No. 2, J-186-1988 (argued October 25, 1988) amicus brief of Board on behalf of Surrick.

74. It is an inescapable conclusion, therefore, that confidential information has been directly leaked and continues to be directly leaked to reporters Bill Moushey and Dan Biddle by sources on or within the Board.

WHEREFORE, it is respectfully requested that all proceedings at Board Matter 140 be dismissed because of the blatant and serious breach of the confidentiality of these proceedings which has irreparably harmed respondent and prejudiced him and has hampered his defense of the charges against him; alternatively, respondent requests these proceedings be stayed pending an evidentiary hearing before an impartial tribunal to determine the source of the leaking of confidential information to the media in violation of the confidentiality of the proceedings mandated by the Constitution of this Commonwealth.

B. Composition of Judicial Inquiry and Review Board

75. As set forth in the preceding section, the actions of the six member En Banc panel of the Board, and the ordered hearings *ab initio* before those six members on November 14, 1988, violate and will violate the constitutional and statutorily mandated composition of the Board.

76. The vacancy created by the resignation of Judge Bonavitacola, whose term of office would have expired on January 1, 1989, has not been filled by the Supreme Court.

77. Additionally, the recusal of Judges Rowley and Ross from all legal and factual matters involving respondent at Board Matter Number 140 has resulted in the *de facto* vacancy, for all practical effects and purposes, of those two judge members of the Board in this matter.

78. Judge Rowley's term of office on the Board expires on December 3, 1988; Judge Ross' term of office on the Board expires on January 1, 1989.

WHEREFORE, as respondent has been and will be deprived of his constitutional and statutory rights to be judged by a full nine member Judicial Inquiry and Review Board consisting of two judges of the Superior Court, three judges of the Courts of Common Pleas, two lawyers and two laypersons, and has been therefore denied due process and equal protection of the laws guaranteed by the Constitutions and the Consolidated Statutes of the United States and of this Commonwealth, respondent requests the Supreme Court to stay all further proceedings in this matter pending the appointment by that Court of the appropriate Superior Court and Common Pleas judges to fill the vacancies of Judges Bonavitacola, Rowley and Ross or until after the Supreme Court fills all three said vacancies in due course after expiration of the respective terms of office.

III. APPLICATION TO SEVER CHARGES

A. Charges III, IV and V

79. It is clear that the "Amended/Reapproved Charges" III, IV and V could not be filed as Rule 8 amendments to the

pending proceedings at Board Matter Number 140 because said charges did not "conform to proof or . . . set forth additional facts" developed at said proceedings; the order of six members of the Board of October 11, 1988 conclusively establishes that said charges were not Rule 8 "Amendments."

80. Charges III, IV and V concern allegations made by Judge Narick of unrelated and completely separate *ex parte* communications alleged to have been made by respondent from 1984-1986 allegedly involving separate and distinct parties, dates and cases.

81. Judicial Inquiry and Review Board Proceedings have been determined to be quasi-criminal proceedings. *Matter of Dandridge*, 462 Pa. 67, 74, 337 A.2d 885, 888 (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, 745, 758 (1979).

82. As Judge Munley has stated, the quasi-criminal nature of the instant proceedings "would raise the plethora or the umbrella of all of the protection that would flow to a person in a criminal setting." Notes of Testimony, October 5, 1988 at 1728. *See also* concurring and dissenting opinion of Justice McDermott in *Judicial Inquiry and Review Board v. Snyder*, ____ Pa. ____, 523 A.2d 294, 300-01 (1987) ("The removal of a duly elected judicial officer is a matter of the gravest possible concern. The exercise of such power must be rounded *at the very least*, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.")

83. The Pennsylvania Rules of Criminal Procedure provide:

> RULE 229. AMENDMENT OF INFORMATION
>
> The court may allow an information to be amended when there is a defect in form, the description of the offense, the description of any person or any property, or the date charged, *provided the information as amended does not charge an additional or different offense*. Upon amendment the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

84. As a quasi-criminal prosecution, the joining (amending) of new Charges III, IV and V with Charges I and II is absolutely

prohibited by Pa. Crim. Pro. Rule 229 and caselaw applying Rule 229. *See, e.g., Commonwealth v. Shirey*, 333 Pa. Super. 85, 481 A.2d 1314 (1984), appeal after remand, 343 Pa. Super. 189, 494 A.2d 420 (1985); *Commonwealth v. Gray*, 329 Pa. Super. 347, 478 A.2d 822 (1984).

85. Even in a civil proceeding joinder of entirely new and unrelated causes of action with the original causes of action at this stage of the proceedings would be prohibited and prejudicial. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *see* Pa. R.Civ.Pro. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) and *Lohmiller v. Weidenbaugh*, 302 Pa.Super. 174, 448 A.2d 583 (1982), rev'd on other grounds, 503 Pa. 329, 469 A.2d 578 (1983).

86. The United States Supreme Court has declared that a respondent to a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the respondent are added during disciplinary proceedings based on evidence adduced at said proceedings. *In Re Ruffalo*, 390 U.S. 544 (1968); *a fortiori* charges added to and during a pending proceeding based upon investigations totally extraneous to the proceeding would deprive the respondent of fair notice and due process per *Ruffalo*.

87. The United States Supreme Court stated in *Ruffalo*, 390 U.S. at 551:

> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 US 1, 33, 18 Led 2d 527, 549, 87 S Ct 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

88. Likewise in the instant proceedings, the manner in which the original charges would have been met (defense strategy, witnesses, pleadings, etc.) could have been and would have been substantially altered had Charges III, IV and V been filed prior to the commencement of this complicated and lengthy proceeding, so that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.*

89. *See also Judicial Inquiry and Review Board v. Fink*, 516 Pa. 208, 532 A.2d 358, 361 (1987). ("We do not address or consider the Board's findings that Respondent attempted to deceive the Board concerning the proffered testimony of the 'mystery witness' because those findings do not concern formal charges made against the Respondent. If the Board wishes to initiate action against the parties involved in the 'mystery witness' episode, *then formal proceedings should be commenced, those charged should be notified of the charges against them, and they should be given an opportunity to prepare a defense and respond to the charges*. For purposes of the adjudication of this case, the 'mystery witness' matter has no bearing and forms no part of our consideration or rationale.")

90. As noted in paragraph 13 herein, substantial time, energy, financial expense and legal and judicial resources have been expended in defending Charges I and II at Board Matter Number 140, and the respondent's defense was approaching completion.

91. Respondent's defense presentation and strategy has at all times been designed and molded to conform to the original Charges I and II as to which he had been noticed and responded pursuant to Article V, section 18 and the Rules of Procedure Governing The Board.

WHEREFORE, it is submitted that it is manifestly unfair and is a denial of due process, and equal protection guaranteed by the Constitutions and the Consolidated Statutes of the United States and of this Commonwealth, the analogous rules of criminal procedure and fundamental notions of fair play to consolidate Charges III, IV and V with Charges I and II at Board Matter 140, and respondent requests severance of Charges III, IV and V not only from original Charges I and II, but also

severance of each Charge III, IV and V to be separately noticed and heard in separate proceedings before the Board.

B. Charges I and II

92. Original Charges I and II concern allegations and averments of unrelated and completely separate and distinct events and matters which should not be consolidated in a single proceeding as required by the En Banc six member panel's order of October 11, 1988.

WHEREFORE, upon commencement of new hearings *ab initio* of said Charges I and II as directed by the orders of October 11 and 24, 1988, Formal Proceedings regarding said charges should be also severed and prosecuted in separate proceedings.

IV. APPLICATION FOR DISMISSAL OF CHARGES III, IV AND V FOR LACK OF SPECIFICITY OR, ALTERTATIVELY, FOR MORE SPECIFIC CHARGES OR FOR A PLEADING IN THE NATURE OF A BILL OF PARTICULARS

93. New Charges III, IV and V are insufficient and fail to "specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based," (see Rule 2(b)) specifically:

(a) Charge III gives no docket number or other citation to *Mercede Center, Inc. v. Equibank, Cook and Caribank* nor does it specify the relevant time frame;

(b) Charge IV gives no case name, no docket number or other citation to "a zoning case involving a business entity named *McDermott Land Company*," nor does it specify the relevant time frame;

(c) Charge V is totally lacking in factual averments in that it fails to identify any relevant time frame for the alleged improper *ex parte* communications regarding "certain tax appeal cases" being "handled by Attorney Leonard Mendelson" other than "at some point" after 1984, and gives neither case names, docket numbers, or other citations, nor the names of "particular judges" alleged.

94. Due to the lack of specificity and conciseness in said

Charges III, IV and V it is impossible to prepare an intelligent responsive answer to said vague and non-specific charges which are constitutionally deficient in failing to provide adequate notice of the charges against respondent.

WHEREFORE, respondent requests dismissal of Charges III, IV and V for failure to specify the charges and the alleged facts upon which they are based and said charges deprive respondent of due process and equal protection of law as guaranteed by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth in failing to provide adequate notice of the charges against him denying him, therefore, a meaningful opportunity to defend against said charges; in the event said charges are not dismissed, respondent requests the Supreme Court to direct the Board to supply more specific charges or a pleading in the nature of a bill of particulars.

V. APPLICATION TO DISMISS ORIGINAL CHARGES AND II ON GROUNDS OF DOUBLE JEOPARDY

95. As set forth in paragraph 13 herein, respondent has expended considerable time, energy and personal and financial resources in his defense to the original Charges I and II as to which he received the requisite Notice of Formal Proceedings at Board Matter Number 140.

96. The order of the six member panel of the Board of October 11, 1988 "directs the panel currently hearing Board Matter 140 to suspend hearings on that matter."

97. That order further states that: "3. In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members."

98. The Notice of Hearing executed by Board Counsel Keuch on October 24, 1988 informs respondent that the contemplated, consolidated hearing *ab initio* on all Charges I-V will commence on November 14, 1988.

99. Thus, the orders of October 11, 24, and 31, 1988 *sua sponte* abort the proceedings at Board Matter Number 140 (in effect, declare a "mistrial") without cause of a necessitous

and compelling nature, and compel respondent to stand trial anew despite the enormous time, energy and personal and financial resources he has been forced to expend to date to defend against Charges I and II.

100. It is submitted and the record will demonstrate that respondent was and is prevailing on the merits of Charges I and II, and that the extraordinary, unprecedented and unheard of procedure (never in the history of the Board has a hearing committee of more than three members of the Board been convened) directed by the six member panel of the Board on October 11, 1988 and by Mr. Keuch on October 24, 1988, was designed to attempt to ensure the participation of Chairman Kauffman in these proceedings (now as to expanded Charges I-V) so that he may act and cast his vote against respondent and so that he may continue to orchestrate these proceedings to respondent's disadvantage; respondent's allegations in this regard are based upon and supported by the following averments and inferences:

(a) Chairman Kauffman's term of office on the Board will expire at 12:01 a.m. on November 15, 1988;

(b) Chairman Kauffman has been asked by respondent to recuse himself from these proceedings due to his demonstrable personal bias, hostility and animosity toward respondent and his "unalterable personal view that Justice Larsen had to be removed from the bench" (*see* affidavit of Richard A. Sprague, Esquire, attached hereto as Exhibit O);

(c) Chairman Kauffman would be relieved of his duties on November 15, 1988 and he would have no further official or authorized participation in the deliberations and determination of these proceedings against respondent, unless he were a member of a hearing committee participating in "any hearing in progress at the end of his term;" *see* Article V, section 18(b); 42 Pa.C.S.A. § 2102(b);

(d) The order of October 11, 1988 "deeming" its void, invalid and unconstitutional action of October 3, 1988 effective as of October 3, 1988 and retroactively setting a time to answer the "deemed" Rule 2 "Reapproved Charges" III, IV and V by October 24, 1988 (i.e., twenty days from October 3, 1988), was a superficial attempt to appear to comply with Rule 4 by setting a hearing date on the now "consolidated" charges

before November 15, 1988 since Rule 4 requires the Board to "give notice of such hearing. . . at least twenty (20) days prior to the date set," but only after a twenty day period within which to file an answer to formal charges has elapsed;

(e) As noted previously, the order of October 11, 1988 "deeming" pseudo-life into the void, invalid and unconstitutional previously-called "Rule 8 Amended Charges," and retroactively "deeming" said charges to have been "correctly and properly issued," which, in fact, only gave respondent twelve days in which to file an answer, deprives respondent of the full time mandated by the Rules, and mandated by due process and equal protection, by depriving him of the full twenty days required by Rule 2(b) and of the additional time required by Rule 1(b) ("reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose"); the twenty days to file a written answer to charges provided by Rule 2(b) should thus run from October 12, 1988 (date of defective service of the order of October 11, 1988), and thus November 1, 1988 should have been the absolute minimum time set by the order of October 11, 1988 within which to file a written answer;

(f) Moreover, the order of October 11, 1988 deprives respondent of the time provided by the explicit assurances made by Board Counsel Keuch on October 5, 1988 that the time for filing a written answer to Charges III, IV and V would be tolled or suspended pending disposition of respondent's then objections to the attempted "Amended Charges" III, IV and V;

(g) The letter of Mr. Keuch of October 20, 1988 further supports the inference of an attempt to ensure Chairman Kauffman's participation in Board Matter Number 140, in that it: offers, on the one hand, the incredible and unbelievable assertion that "the need to expedite proceedings against a sitting member of the Judiciary . . . particularly . . . a member of the highest court" justifies the blatant violations of due process, equal protection and other provisions of the state and federal constitutions, of the Consolidated Statutes, and of the Board's own Rules promulgated by the Supreme Court; and yet, on the other hand, it "magnanimously offers" to extend the time for filing an answer to Charges III, IV and V, but only upon the

coercion of a written waiver of the twenty days required by Rule 4 and commencement of the hearings *ab initio* on November 9, 1988; this "time is of the essence" assertion is implausible and unbelievable because said letter of October 20th states that on November 9, 1988, the "first order of business . . . will be the consideration of any motions . . . including the request for any additional time necessary to prepare the defense. . . ." additionally, the order of October 31, 1988 (Exhibit I) provides that "at the commencement of the hearing on November 14, 1988 [the Board] will consider a request for an extension of time to prepare a defense;"

(h) The Notice of Hearing of October 24, 1988 further supports the inference of a willingness to ignore the Board's own Rules in an attempt to ensure Chairman Kauffman's participation in Board Matter Number 140, in that: said Notice was entered solely by Board Counsel Keuch without consideration by the Board members as required by constitution, statute and rules of procedure; said Notice was entered in violation of Rule 4 which states that the Board shall set a hearing date *only after* the expiration of the time for filing an answer; even per "the Board's" illegal order of October 11, 1988, the time for filing an answer could not have expired, at the earliest, until midnight on October 24, 1988, yet the Notice of Hearing was executed by Mr. Keuch prior to 1:00 p.m. on October 24, 1988; said Notice sets an illegal hearing date which deprives respondent of one day of the twenty day *prior*-to-hearing-date notice absolutely required by Rule 4 (*see* paragraph 55, *supra*);

(i) The denial of respondent's Supplemental Omnibus Applications on October 31, 1988 (Exhibit I) further supports the inference of an attempt to ensure Chairman Kauffman's participation in Board Matter Number 140, and to otherwise deprive respondent of a fair hearing, due process of law, equal protection, right not to be twice placed in jeopardy of punishment and prosecution, right to counsel, and of other procedural and substantive rights derived from the Constitutions and Consolidated Statutes of the United States and of this Commonwealth, and of the Board's own rules, in that said action of October 31, 1988 denies all of respondent's requests for relief without any answer being filed to the averments, without oral argument and without opinion;

(j) The illegal and unconstitutional actions and timings discussed in sub-paragraphs (d-i) are designed and intended to "lock-in" Chairman Kauffman to further participate in this matter after the expiration of his term by commencing the hearing *ab initio* on all Charges I, II, III, IV and V on November 14, 1988, the last day that Chairman Kauffman can officially act as a member of the Board, and further to give Board Counsel a "second bite at the apple" since Board Counsel was not prevailing on the merits of Charges I and II.

WHEREFORE, it is submitted that the unique, bizarre and unheard of procedure ordered by the six member panel of the Board on October 11, 1988 and Mr. Keuch on October 24, 1988 violates respondent's state and federal constitutional rights not to be twice placed in jeopardy of punishment and prosecution, violates his state and federal constitutional rights to due process, equal protection of law and right to counsel, and to fundamental fairness, deprives respondent of any semblance of fair play and exacerbates the appearance of impropriety that has permeated this proceeding from its inception, as previously discussed in Respondent's Application For Disqualification of All Board Members and in Respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings filed in the Supreme Court of Pennsylvania on July 29, 1988 (which Applications and Responses are incorporated herein by reference); it is respectfully requested, therefore, that Charges I and II be dismissed with prejudice.

VI. APPLICATION TO DISMISS ALL CHARGES ON GROUNDS OF PROSECUTORIAL MISCONDUCT

101. On or about June 15, 1988, respondent filed the aforementioned Application for Disqualification of All Members of the Judicial Inquiry and Review Board alleging, inter alia, that:

> participation in this matter against respondent by the current members of the Board, individually and collectively, has deprived and will continue to deprive respondent of his due process right to a fair hearing before a fair and impartial tribunal and of his civil and constitutional rights under the Constitution of the

United States, the Pennsylvania Constitution, and applicable federal and state statutes. . .

102. On June 29, 1988, said Application for Disqualification was denied by "eight members of the Board, excluding Judge Ross," and the Order Denying Application For Disqualification was executed by "Robert L. Keuch, Executive Director and General Counsel," who serves as the prosecutor for the Board.

103. On July 27, 1988, respondent filed in the Supreme Court of Pennsylvania, Eastern District, the aforementioned and incorporated Applications for Writ of Prohibition, Extraordinary Relief, and Stay of Judicial Inquiry and Review Board Proceedings alleging, inter alia, that the makeup and composition of the Board necessarily and improperly results in excessive commingling of prosecutorial and adjudicatory functions including the wearing of "two hats," as prosecutor and adjudicator, by the Executive Director of the Board and its General Counsel, Mr. Keuch.

104. As previously noted, Mr. Keuch has signed orders for and by the Board on numerous occasions, including the granting of a continuance on July 5, 1988 (a copy of which is attached hereto as Exhibit P); the denying of respondent's Application for Disqualification (a copy of which is attached hereto as Exhibit Q); the filing of the so-called "Amended Charges" on October 3, 1988 (Exhibit A); the setting of a time period of only three days within which to answer said charges (Exhibit B); the denial on October 20, 1988 of counsel for respondent's request for an extension of time to file a written answer (Exhibit G); and the issuing of the Notice of Hearing on October 24, 1988 (Exhibit J); and the issuing of the order of October 31, 1988 denying all of respondent's requests for relief set forth in his Supplemental Omnibus Application (Exhibit I); thus Board Counsel Keuch, who acts as prosecutor for the Board, repeatedly operates in a judicial capacity and performs adjudicative functions simultaneously and in addition to prosecutory functions.

105. As set forth in paragraphs 60 and 61 herein and in the Notes of Testimony for September 12-13, 1988 at 1204-16, 1441-96, and in the presentation of the proposed "Amended

Charges" III, IV and V, respondent has been seriously prejudiced in this matter by the *ex parte* presentation by Board Counsel Keuch of the highly inflammatory, irrelevant extraneous matters to the eight sitting members of the Board, including the three member hearing committee, in the middle of the proceedings at Board Matter Number 140.

106. As demonstrated by these incidents and events, the commingling of prosecutorial and adjudicatory functions, and the constitutional shortcomings inherent in the current Judicial Inquiry and Review Board system have been magnified and exaggerated throughout these proceedings by the unique circumstances of this case peculiar to respondent, to his severe and everlasting prejudice.

107. As Mr. Keuch stated on October 10, 1988, the "most important reason" for the existence of the Judicial Inquiry and Review Board and the procedures mandated by the Constitution, the Consolidated Statutes, and Board Rules "is to protect the integrity of the judicial system." Notes of Testimony, October 10, 1988 at 76.

108. To date in the proceedings at Board Matter Number 140 (ostensibly designed "to protect the integrity of the judicial system") we have witnessed the following: a sudden "rush to judgment" and hastily scheduled hearings after more than a year of Board investigation; sworn allegations of attempts to suborn perjury, obstruct justice and coerce witnesses, *see* affidavit of Nikolai Zdrale attached as Exhibit R, with no investigation or efforts by the Board to determine the validity of said allegations or referral to law enforcement agencies; continual and extensive commingling of prosecutorial and adjudicatory functions far beyond those inherent and inevitable in the Judicial Inquiry and Review Board system itself; discovery violations of "*Jencks*" and "*Brady*" requirements and the rules of fair play; the unnecessary, bad faith introduction of highly prejudicial, irrelevant matter polluting the proceedings beyond repair; the erroneous denial of respondent's right to confront and to impeach the credibility of his accuser by use of said accuser's felony convictions for nationwide criminal conspiracy to distribute cocaine through the Federal Express system; one judge member of the Board, designated as Chairman of the hearing committee in this proceeding, inexplicably resigning

his office six days before hearings were scheduled to commence, with no replacement forthcoming to fill the vacancy; two judge members of the Board recusing themselves in all matters involving respondent because they are material witnesses as to Charge I only whose testimony flatly contradicts each other's on a key issue of credibility; continual, massive, detailed leaking of confidential information which can only come directly from the Post-Gazette's and Inquirer's "sources on the Board" without any attempt (such as evidentiary hearings) to discover the source and plug the leak; an attempt by Mr. Keuch to coerce respondent into waiving the protection afforded by Rule 4 which requires twenty days notice prior to a formal hearing; numerous actions and orders being taken for "the Board" in derogation of constitution, statute and Rule by deficient panels of the Board and/or Mr. Keuch even though "the board shall act only with the concurrence of a majority of its members"; and the extraordinary, unprecedented and unheard of procedure whereby only three members of the Board (including Chairman Kauffman who has previously stated he would do everything in his power to have respondent removed from the bench) file vague "Rule 8 Amended Charges" over Mr. Keuch's signature, and thereafter employ the disingenuous legal fiction of "deeming" said charges to have been "Rule 2 charges" even though Rule 2 procedures have been utterly ignored, and setting illegal and constitutionally deficient periods of time within which to file a written answer and to notify respondent of the date set for hearing in order to ensure Chairman Kauffman's continued participation in these proceedings by aborting the extensive proceedings that have already caused enormous expenditures of time, energy, and personal and financial resources to respondent and were proceeding favorably to him, and illegally ordering hearings on the consolidated charges *ab initio* before a six member panel of the Board, including Chairman Kauffman, on the last day that Chairman Kauffman can officially act as his term of office expires on November 15, 1988 at 12:01 a.m., the first time in history that more than three members of the Board have participated on a hearing committee; and an attempt to deprive respondent of counsel of his choosing by the deliberate scheduling of hearings at a time when the proceedings were to

have been completed and counsel for respondent was scheduled to represent a defendant in a major federal criminal prosecution, of which the Board and its prosecutor were well aware (*see* section VIII, *infra*).

109. Rather than protecting the integrity of the judicial system, the instant proceedings have become a travesty of justice and have deprived and continue to deprive respondent of significant procedural and substantive rights derived from the State and Federal Constitutions, the Consolidated Statutes of the United States and of this Commonwealth, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness, fair play and justice.

WHEREFORE, for all of the foregoing reasons, respondent requests the Supreme Court to dismiss all Charges against respondent, with prejudice, on the basis of excessive and impermissible commingling of prosecutorial and adjudicatory functions, prosecutorial misconduct, overreaching and bad faith which has resulted in repeated and continual violations of the rights to due process of law, to equal protection of law, to confront one's accusers, and to not be twice placed in jeopardy of punishment and prosecution, which rights are guaranteed by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth.

VII. APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO "AMENDED/REAPPROVED CHARGES" III, IV AND V

110. As previously set forth, the Board can act "only with the concurrence of a majority of its members" (i.e., five members) and its members "shall consist of" two Superior Court judges, three Common Pleas judges from different judicial districts, two lawyers and two laypersons. Article V, section 18(a) and (b) of the Pennsylvania Constitution; 42 Pa. C.S.A. sections 2102-03.

111. It is undisputed that the order of October 3, 1988 erroneously purporting to be an "Amendment" to the Formal Charges "pursuant to Rule 8," and attempting to add Charges III, IV and V to Board Matter 140 as "Amended Charges," was

acted upon by only three members of the Board consisting of one Superior Court judge, one lawyer and one layperson.

112. Accordingly, the October 3, 1988 action and "Amended Charges" of the Board are unconstitutional, illegal and null and void, and are of no legal effect whatsoever.

113. The order of October 11, 1988 is also illegal, unconstitutional and in blatant violation of the Supreme Court's Rules of Procedure Governing the Board, as is set forth fully in preceding sections.

114. The Notice of Hearing of October 24, 1988 is also illegal, unconstitutional and in blatant violation of the Supreme Court's Rules of Procedure Governing the Board, as is set forth fully in preceding sections.

115. As set forth more fully in the preceding sections, the order of October 11, 1988 was upheld by the Board over respondent's objections; even starting at that point, therefore, i.e. October 11, 1988 (without conceding that said order of October 11th was valid), the time set therein for respondent to file a written answer on or before October 24, 1988 to Charges III, IV and V, is manifestly unreasonable, illegal and unconstitutional, for the following reasons:

(a) The order of October 11, 1988 resurrects the eight day period between October 3, 1988 and October 11, 1988, even though the October 3, 1988 "Amended Charges" were and are null and void and of no legal effect whatsoever, and retroactively and illegally posits that eight day period into the twenty day period required by Rule 2(b) within which respondent may file a written answer;

(b) The eight day period between October 3-11, 1988 was consumed by respondent and by counsel for respondent in preparation for and participation in the conferences on October 5, 8 and 10, 1988;

(c) The order of October 11, 1988 ignores and retroactively takes-back the assurances given to respondent and his counsel by Mr. Keuch that the time for filing an answer to the October 3, 1988 Charges III, IV and V would be tolled or suspended pending disposition of respondent's objections and the legal issues concerning same, which resolution (illegal and invalid) did not take place until October 11, 1988.

(d) The order of October 11, 1988 "deeming" the

"Amended Charges" of October 3, 1988 to have been "correctly and properly issued" as of October 3, 1988 also deprives respondent of the additional time allotted and required by Rule 1(b) to afford respondent a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" before the Board may file a Notice of Institution of Formal Proceedings;

(e) The vagueness and lack of specificity of the "Amended/Reapproved Charges" III, IV and V renders it impossible to file an intelligent response to said charges, and requires extensive and intensive research and investigation merely to determine what cases, times, dates, judges and proceedings to which these nebulous charges refer;

(f) The time necessary and appropriate for the filing of the Supplemental Omnibus Application challenging the validity of the October 11, 1988 "Reapproved Charges" and the time which elapsed pending disposition of said Application cannot be counted against respondent regarding the twenty days required by Rule 2(b) within which to file a written answer to said charges, *see* Pa. R.Civ.Pro.Rule 1028(d) ("If the preliminary objections are overruled, the objecting party shall have *the right to plead over* within twenty (20) days after notice of the order or within such other time as the court shall fix.");

(g) Additionally, whereas respondent, a member of the Pennsylvania Supreme Court, and his counsel had May-August, 1988, the relatively "slow" summer period for the Court, to prepare an answer and defense to the original Charges I and II, the Court is currently emeshed in the heart of its "busy" season, having just completed oral arguments and opinion assignments on September 26-30, 1988 in Pittsburgh, and on October 24-28, 1988 in Philadelphia, and with oral arguments/opinion assignments scheduled in Philadelphia December 5-9, 1988, and January 17-20, 1988.

(h) The Notice of Hearing of October 24, 1988 deprives respondent of one day of the twenty days notice prior-to-hearing to which he is absolutely entitled under Rule 4.

WHEREFORE, in the event that the Supreme Court denies respondent's requests for relief set forth herein and upholds the validity of "the Board's" orders of October 11, 24, and 31, 1988 over objections, respondent requests an extension of time

as of right, at least until February 1, 1989, to file a written answer to the "Reapproved Charges" III, IV and V.

VIII. APPLICATION TO DISMISS FOR VIOLATION OF RESPONDENT'S RIGHT TO COUNSEL GUARANTEED BY STATE AND FEDERAL CONSTITUTIONS

116. As previously set forth in paragraph 15, the Board through its prosecutor, Mr. Keuch, the hearing committee and counsel for respondent had agreed upon and established a hearing schedule which would have completed the hearing proceedings at Board Matter Number 140 on or before October 21, 1988.

117. As previously set forth in paragraph 16, counsel for respondent, in reliance upon said agreement and established schedule, committed himself to represent a defendant in a major federal criminal prosecution commencing on October 24, 1988 in the United States District Court for the Eastern District of Pennsylvania in a case involving four other defendants and their lawyers from New York and over 100 government witnesses, which is expected to take two months without possibility of continuances; the trial court specifically denied counsel for respondent's request for a continuance in that federal prosecution.

WHEREFORE, the actions and orders of the illegal and unconstitutional three and six member panels of the Board, and of Mr. Keuch for the Board, in requiring respondent to answer the illegal and unconstitutional additional Charges III, IV and V on or before October 24, 1988, and the illegal and unconstitutional setting by Mr. Keuch of a hearing date of November 14, 1988, deprives respondent of his state and federal constitutional guarantees of counsel of his own choosing, as well as his guarantees of due process and equal protection of law, and is a manifest abuse of the discretion that the Board possesses to grant continuances and extensions of time to accomodate the reasonable requests of a respondent judge and his attorney. *See, e.g. Maine v. Moulton*, 474 U.S. 159, 170-71 (1985) ("Once the right to counsel has attached and been asserted, the State must of course honor it. . . . The Sixth Amendment also imposes on the State an affirmative obligation

to respect and preserve the accused's choice to seek this assistance. . . . [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."); *Commonwealth v. Ross*, 465 Pa. 421, 427-28, 350 A.2d 836 (1976) (trial court infringed on defendant's right to counsel of his own choice when it refused to grant continuance for purpose of obtaining representation by counsel of his choice); *Budget Laundry Company v. Munter*, 450 Pa. 13, 298 A.2d 55 (1972) (failure of trial court to grant reasonable request for continuance to allow civil litigants opportunity to be represented by counsel of their own choosing where said counsel was also trial counsel in a conflicting federal court proceeding at time was a manifest abuse of discretion); respondent therefore requests the Supreme Court to vacate the orders of October 3, 11, 24, and 31, 1988 and to stay any and all further proceedings at Board Matter Number 140 until chosen counsel for respondent, A. Charles Peruto, is available to represent respondent in said proceedings.

IX. APPLICATION FOR RELIEF

118. Respondent incorporates by reference the factual averments and renews the various requests for relief set forth in the initial Applications for Relief filed in the Supreme Court at JIRB Docket No. 138 on July 29, 1988.

119. Paragraphs 1-117 of the instant Second Applications for Writ of Prohibition and for Extraordinary Relief are incorporated herein by reference along with the various requests for relief set forth therein; respondent supplements the Initial Applications filed in the Supreme Court on July 29, 1988 with the averments and requests for relief set forth therein.

X. JURISDICTION

120. The Supreme Court may assume plenary jurisdiction of this matter under its King's Bench powers, recognized at 42 Pa.C.S. § 502 and Pa. R.App.Pro.Rule 3309, to correct a grevious abuse of discretion, authority and jurisdiction by the Board which has continually and flagrantly violated its

own rules of procedure, has deprived respondent of significant procedural and substantive rights guaranteed respondent by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth, including the rights to due process equal protection of law, the right to counsel, the right not to be twice placed in jeopardy of punishment or prosecution for the same offense, and in derogation of traditional notions of fundamental fairness, justice and fair play, and the right to adjudication before the full nine member complement of the Board consisting of two Superior Court judges, three Common Pleas Court judges, two lawyers and two laypersons, all of which demonstrates that the Board in this case has acted without and beyond its jurisdiction. *See Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County*, 507 Pa. 193, 489 A.2d 1286 (1985) and *Reilly by Reilly v. SEPTA*, 507 Pa. 204, 218, 489 A.2d 1291 (1985).

121. The Supreme Court may grant a writ of prohibition, pursuant to 42 Pa.C.S. § 721(2) and Pa.R.A.P. 3307, prohibiting each and every member of the Board from any further participation in this matter, for the reasons set forth in paragraph 120. *Municipal Publications, Inc.*, *supra* and *Glen Mills Schools v. County of Common Pleas of Philadelphia County*, 513 Pa. 310, 520 A.2d 1379 (1987);

122. The Supreme Court, generally, has jurisdiction and supervisory authority over inferior tribunals within the unified judicial system, which includes the Judicial Inquiry and Review Board, and inherent authority to correct abuses of the authority and jurisdiction vested in said tribunals. Pa. Const. Article V, sections 1, 2 10(a) and (c), 18, and Schedule, section 24; 42 Pa.C.S. §§ 502 and 503; Pa. Rules of Judicial Administration, Rule 701.

WHEREFORE, the Supreme Court of Pennsylvania has jurisdiction to entertain the instant Second Applications for Writ of Prohibition and for Extraordinary Relief, and to grant respondent's requests for relief set forth therein.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

ss:

Before me, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing SECOND APPLICATION FOR WRIT OF PROHIBITION AND SECOND APPLICATION FOR EXTRAORDINARY RELIEF are true and correct to the best of his knowledge, information and belief.

ROLF LARSEN
Rolf Larsen

SWORN to and subscribed
before me this 2nd day
of November, 1988.
BERNADETTE M. SEIBERT
Notary Public

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

NOTICE TO PLEAD

You are hereby notified to file a written response (answer) to the averments set forth in the enclosed Amendments to Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief. Failure to file such a written response (answer) to said averments set forth in said Amendments shall be deemed to be an admission of the averments set forth therein and a stipulation that respondent is entitled to the relief requested.

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

AMENDMENTS TO SECOND APPLICATION FOR WRIT OF PROHIBITION AND/OR SECOND APPLICATION FOR EXTRAORDINARY RELIEF

AND NOW comes Rolf Larsen, respondent at Judicial Inquiry and Review Board Matter Number 140 (Supreme Court Docket No. 138), through his counsel, A. Charles Peruto, Esquire, who files the following Amendments to respondent's Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief (hereinafter "Second Applications"), and setting forth additional requests for relief:

XI. APPLICATION FOR DECLARATORY JUDGMENT

123. On November 3, 1988, respondent filed the said

Second Applications with the prothonotary of the Eastern District in the Supreme Court of Pennsylvania.

124. On November 4, 1988, respondent presented an Application for Stay to a Single Justice of the Supreme Court of Pennsylvania pursuant to Pa.R.App.Pro. Rule 123(e) (a copy of which is attached hereto as Exhibit S) to Mr. Justice Nicholas P. Papadakos requesting, inter alia, a stay of proceedings at Board Matter Number 140; oral argument took place in Mr. Justice Papadakos' chambers on that date, at which time respondent was represented by counsel John H. Bingler, Esquire, and the Board by Executive Director and General Counsel Keuch. Mr. Bingler was retained to represent respondent on this Application to Stay to a Single Justice due to the unavailability of counsel, A. Charles Peruto, who is and was representing a criminal defendant in a major federal trial in the United States District Court for the Eastern District of Pennsylvania, as is set forth fully in respondent's Second Application, paragraphs 15-16, 116-117 section VIII.

125. On November 7, 1988, Mr. Justice Papadakos issued an order (a copy of which is attached hereto as Exhibit T) stating as follows:

> AND NOW, this 7th day of November, 1988, *the Notice of Hearing* (J.I.R.B.R.P. 4), *dated the 24th day of October, 1988 is set aside and all proceedings* before the Judicial Inquiry and Review Board at Board Matter 140 are *stayed until further order of this Court*. (Emphasis added).

Said order of November 7, 1988, in plain and unambiguous language (a) set aside the Notice of Hearing of October 24, 1988, and (b) stayed all further proceedings.

126. On November 10, 1988, a majority of the Supreme Court of Pennsylvania issued the following order (a copy of which is attached as Exhibit U):

ORDER

PER CURIAM:

AND NOW, this 10th day of November, 1988, it is hereby ordered:

(1) that *the stay entered on November 7, 1988, by Mr. Justice Papadakos is hereby vacated*;

(2) that the decisions on the Second Application for Leave to File Original Process Pursuant to Pennsylvania Rules of Appellate Procedure Rule 3307 and the Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief are deferred pending receipt of further answer by counsel for the Board.

Mr. Justice Larsen did not participate in the consideration or decision of this matter.

Mr. Justice Zappala and Mr. Justice Papadakos dissent to the vacation of the stay.

Dissenting opinion may follow. (Emphasis added.) [Note: Mr. Justice Papadakos did file a dissenting opinion, a copy of which is attached hereto as Exhibit V.]

127. The Supreme Court's order of November 10, 1988, in plain and unambiguous language, only vacates Mr. Justice Papadakos' stay order, and leaves intact that portion of Mr. Justice Papadakos' order which set aside the October 24, 1988 Notice of Hearing setting a hearing for November 14, 1988.

128. On November 10, 1988, Board Counsel Keuch sent (by hand-delivery to Mr. Peruto, and by telefax delivery to Mr. Bingler and to respondent), a letter (a copy of which is attached hereto as Exhibit W) advising Mr. Peruto that "the temporary stay issued by Justice Papadakos in this matter on November 7, 1988 has now been lifted. Therefore, the hearing

scheduled for November 14 1988 in this matter will be held." Additionally, this letter of November 10, 1988 advises Mr. Peruto that "the first order of business at the hearing will be the consideration of any motions you wish to make and the consideration of any request you and/or your client deem necessary for extensions of time . . . to prepare a defense to the charges." Mr. Peruto was further advised that "the Board, at the hearing on November 14, 1988, will also consider any request you or your client deem necessary for an extension based on [unavailability of counsel Peruto]. I [Keuch] have been authorized to inform you that *any reguests for additional time . . . will be granted by the Board.*"

129. On November 10, 1988, respondent, through counsel James J. Powell, III, Esquire, filed in the United States District Court for the Middle District of Pennsylvania a Complaint for temporary restraining order, preliminary injunction and permanent injunction, and a Motion for Temporary Restraining Order, seeking, inter alia, to enjoin the Board from any further proceedings at Board Matter Number 140.

130. Oral argument was held on November 14, 1988 on the Motion for Temporary Restraining Order before the Honorable William W. Caldwell, at which respondent was represented by Mr. Powell due to the continued unavailability of Mr. Peruto and the Board was represented by Board Counsel Keuch.

131. On November 14, 1988, Judge Caldwell denied respondent's Motion for Temporary Restraining Order, primarily (as deduced from and evidenced by the concerns expressed by Judge Caldwell from the bench) because of the perceived availability of relief in the Supreme Court of Pennsylvania which had deferred decisions on respondent's Second Applications "pending receipt of further answer by counsel for the Board."

132. On November 14, 1988, oral argument took place in Harrisburg before four members of the Board only, namely Chairman Kauffman, Judge Munley, Mr. Hoyle and Mrs. Scarlata; Mr. Kauffman was the chairman of this four member panel; although scheduled to sit as members of the unique six member panel to hear Charges I-V *ab initio*, Judge Montemuro and Mr. Higgins were not present at this proceeding on November 14, 1988; moreover, there were no witnesses present at or subpoenaed for this proceeding and Board

Counsel Keuch did not present any evidence or testimony and was not prepared to do.

133. After preliminary statements by Board Counsel Keuch, Chairman Kauffman declared: "Well, then, these hearings are open and in progress now, and, Mr. Powell, do you have some motions to make, sir?" N.T. November 14, 1988 at 1812-13. (A copy of the notes of testimony of this proceeding on November 14, 1985 is attached hereto as Exhibit X.)

134. Mr. Powell appeared at this proceeding on November 14, 1988 on behalf of respondent, due to the continued unavailability of counsel, Mr. Peruto. Mr. Powell stated "I've been hired for the limited purpose of placing certain objections on the record here today," *id.* at 1813, and he made the following applications:

(a) an application to dismiss said proceeding on the grounds that the Notice of Hearing of October 24, 1988 gave only nineteen days notice to respondent prior to hearing, rather than the mandated twenty days notice under Rule 4 (see paragraphs 55 and 100 of Second Applications);

(b) an application to dismiss said proceeding on the grounds that Mr. Justice Papadakos had "set aside" the Notice of Hearing of October 24, 1988, and the Supreme Court's order of November 10, 1988 did not vacate or reverse that portion of Justice Papadakos' order, nor did it otherwise reinstate the Notice of Hearing of October 24, 1988; hence, the proceeding of November 14, 1988 was not noticed, as required by Rule 4;

(c) a renewal of the various applications made in respondent's previous Supplemental Omnibus Application filed with the Board, and summarily denied by Board Counsel Keuch on October 31, 1988 without answer or response to any of the averments, allegations or requests set forth therein; said Supplemental Omnibus Application included challenges to the composition of the Board and to its taking any action with less than the constitutionally and statutorily mandated majority of the members of the Board, i.e. five members of a Board consisting of the full complement of nine members (five judges, two lawyers and two laypersons);

(d) an application to admit Mr. Peruto's trial schedule into the record (a copy of which is attached hereto as Exhibit Y, along with respondent's letter of November 10, 1988 to

attorney Powell), which establishes Mr. Peruto's unavailability to represent respondent in the instant proceedings through January, 1988, due to his heavy schedule of trials, some of which had already been continued in order to accomodate the proceedings at Board Matter Number 140 which had been scheduled to be completed on or before October 21, 1988; as demonstrated by Exhibit Y, Mr. Peruto is committed to twenty trials between November 21, 1988 - January 27, 1989, including five in which Mr. Peruto is "attached" by order of the trial judge.

135. Mr. Powell and Board Counsel Keuch orally argued for and against, respectively, Mr. Powell's various applications; during oral argument, Board Counsel Keuch presented certain false and/or misleading factual, unsworn testimony and argument to the Board, namely:

(a) (1) That "as the record will show, the prior hearings in this matter were continued, to be resumed on October 10, 1988. During the period the hearings were suspended, however, the Board on October 3rd, 1988 authorized additional charges three, four and five in this matter . . ." N.T. at 1811.

(2) This was false and/or misleading because: the record will show that prior hearings in this matter were not "suspended" on October 3, 1988 but had merely been continued, and had been scheduled to recommence on October 5, 1988 (not October l0th); furthermore, "the Board" did not authorize "additional charges three, four and five" on October 3, 1988, but rather, only Chairman Kauffman, Judge Montemuro and Mrs. Scarlata attempted to add said charges on October 3rd.

(b) (1) That "a notice of this hearing was hand delivered to respondent's counsel on October 24th, the day in which his time for filing an answer expired," N.T. at 1816.

(2) This was false and/or misleading because: a notice of hearing was hand delivered to Mr. Peruto's *office* on October 24, 1988, but it was not delivered to Mr. Peruto on that date; in fact, as he was emersed in federal court proceedings, he did not receive or see said notice until the morning of the *following* day; furthermore, Board Counsel Keuch's statement is misleading in implying that the notice of hearing was entered and hand delivered *after* the time for filing an answer

on October 24th had expired when, in fact, the notice of hearing was delivered to Mr. Peruto's office some ten-eleven hours *before that time had expired.*

(c)(1) That "his counsel had notice, and that is the practice we have followed . . . that matters be served on the respondent, as required by the rules, but that copies be also served upon him [counsel] in his office, and we have done that." N.T. at 1816.

(2) This was false and/or misleading because: it was never agreed, as Board Counsel Keuch represented, that service on counsel would be service on respondent for purposes of the Board's Rules; to the contrary, Board Counsel Counsel Keuch specifically informed Mr. Peruto by letter of March 31, 1988 (a copy of which is attached hereto as Exhibit Z) that the Rules require service be made upon the respondent, but that service upon Mr. Peruto as representative would be acceptable if respondent executed a written waiver of the Rules requiring personal service upon respondent; respondent did not agree to such an arrangement for substitute service nor did he execute such a waiver of the requirements for personal service; hence, service upon Mr. Peruto would not and does not constitute service upon respondent.

(d)(1) That Mr. Justice Papadakos' "stay order, which, of course, includes the entire order, was vacated . . ." by a majority of the Supreme Court, N.T. at 1817.

(2) This was false and/or misleading because: only that portion of Mr. Justice Papadakos' order of November 7, 1988 staying further proceedings was vacated by the Supreme Court majority's clear and unambiguous order of November 10, 1988, which leaves intact that portion of Mr. Justice Papadakos' order which clearly and explicitly states that "the Notice of Hearing (J.I.R.B.R.P. 4), dated the 24th day of October, 1988 is set aside . . .."

(e)(1) That respondent had received the requisite twenty days prior notice (required by Rule 4) of the November 14, 1988 proceeding, N.T. at 1816.

(2) This was false and/or misleading because: respondent received only nineteen days notice prior to the proceedings of November 14, 1988 because he did not receive notice until October 25, 1988 and the proceeding on No-

vember 14, 1988 began on the twentieth day of the required twenty day period, thus depriving him of one day of the twenty day *notice prior to hearing* mandated by Rule 4, *see also* paragraphs 55 and 100 of Second Application.

136. Attorney Powell was placed at a serious disadvantage at the proceeding on November 14, 1988 because he did not have the knowledge or information set forth in paragraph 135 to specifically refute the inaccurate, false and/or misleading factual averments and representations made in Board Counsel Keuch's presentation based on his Keuch's unsworn "testimony" which averments and representations would have been specifically refuted by respondent's counsel of choice, Mr. Peruto, thus further interfering with respondent's right to counsel of his own choosing.

137. Additionally, during the proceedings on November 14, 1988, Chairman Kauffman critically questioned Mr. Peruto's trial schedule (Exhibit Y), and stated "I assume that he has someone else in his office to cover some of these, because he obviously can't be on trial in the present trial and attend the November 21st Commonwealth against McQuillan or Commonwealth against Kendrick or the November 30th Commonwealth against Kendrick." N.T. at 1819.

138. It is improper for any Board member to *assume* any fact not of record, and it was improper for Chairman Kauffman to "assume that [Mr. Peruto] has someone else in his office to cover some of these;" in point of fact, Mr. Peruto was able to have the case of Commonwealth v. McQuillan continued on November 21, 1988 (no new date has yet been set) and has managed to have the November 21, 1988 Commonwealth v. Kendrick case handled by another attorney, although as Mr. Peruto is a sole practitioner, it is not his customary practice to secure substitute counsel "to cover" cases nor is it always possible to do so; moreover, any case for which Mr. Peruto is able to secure a continuance in November, December or January will obviously be rescheduled as soon as possible (most likely in January, February, 1989).

139. Chairman Kauffman's active intervention and false factual assumptions of November 14, 1988 further disadvantaged respondent and implicates his right to counsel since attorney Powell did not have the personal knowledge or the information

to refute the Chairman's false assumption which knowledge and information Mr. Peruto would have and did possess.

140. Chairman Kauffman, for the four members participating in the proceeding on November 14, 1988, unilaterally and summarily denied respondent's various applications (but for the admission of Mr. Peruto's trial schedule which was admitted).

141. Chairman Kauffman then *sua sponte* declared a continuance of the proceedings at Board Matter Number 140 (without request by Mr. Powell), and established a hearing schedule of January 5-6, 1989, January 9-13, 1989, if necessary, and January 16-18, 1989, if necessary; in addition to conflicting with Mr. Peruto's trial schedule, the Supreme Court of Pennsylvania is in session in Philadelphia January 17-20, 1988.

142. Additionally, Chairman Kauffman directed Mr. Peruto to advise Board Counsel Keuch on or before December 23, 1988 as to what portions of the record of the aborted proceedings at Board Matter Number 140, if any, Mr. Peruto agreed to have incorporated into the hearings *ab initio* before six members of the Board on consolidated Charges I-V.

WHEREFORE, respondent requests this Court to issue the following additional relief in the nature of a declaratory judgment:

(a) To declare the November 14, 1988 "hearing" before four members of the Board null and void and of no legal effect because of the failure of the Board in its order of October 24, 1988 to give respondent the full twenty days prior notice as required by Rule 4; because of the failure of the Board to provide *any* Notice of Hearing of the "hearing" of November 14, 1988, as Justice Papadakos' order setting aside the Notice of Hearing of October 24, 1988 was not reversed or vacated by a majority of the Supreme Court, and is still in effect; and because the "hearing" was before an unconstitutional and illegal four member panel of the Board.

(b) To declare that there was not a "hearing in progress" on November 14, 1988 because: prior orders of the Board on October 11, 1988 and October 24, 1988 had, respectively, initially suspended all proceedings at Board Matter Number 140, and then finally aborted all previous proceedings at Board Matter Number 140; the Notice of Hearing of October 24,

1988 setting a hearing date of November 14, 1988 failed to provide respondent with the full twenty days notice prior to hearing required by Rule 4; there was *no notice of hearing* provided to respondent as required by Rule 4 because the order of Mr. Justice Papadakos of November 7, 1988 "set aside" the Notice of Hearing of October 24, 1988 and that portion of said order of November 7, 1988 was plainly not affected by the Supreme Court's order of November 10, 1988; and because the proceeding of November 14th was a sham proceeding intended only to create the transparent appearance that a hearing had commenced in order to "lock-in" Chairman Kauffman and Mr. Higgins (both of whose terms of office expired on November 15, 1988 at 12:01 a.m.) to participate in the proceedings at Board Matter Number 140, as demonstrated by the fact that only four of the six members appeared for the sham "hearing" unprepared to hear or accept evidence or testimony, and the fact that Chairman Kauffman immediately *sua sponte* declared a continuance of the proceedings until January 5, 1989.

(c) To declare that, in the event the Supreme Court determines that a hearing was "in progress" in Board Matter Number 140 on November 14, 1988, Mr. Higgins was not a member of such a "hearing in progress" on that date due to his absence;

(d) To declare that the terms of office of Messrs. Kauffman and Higgins have expired as of November 15, 1988, and that as neither was a member of "any hearing in progress at the end of his term," to declare that both are prohibited from any further participation in any proceedings against respondent at Board Matter Number 140.

XII. APPLICATION TO DISMISS FOR VIOLATION OF RESPONDENT'S RIGHT TO COUNSEL GUARANTEED BY STATE AND FEDERAL CONSTITUTIONS

143. The additional facts set forth in paragraphs 123- 142 herein supplementing respondent's Second Applications are hereby incorporated by reference (which additional facts include that counsel, Mr. Peruto, was unavailable for the proceedings on November 4, 10 and 14, 1988 and that he will

remain unavailable at least through January, 1989) further demonstrate the Board's and Board Counsel Keuch's willful and deliberate interference with and deprivation of respondent's right to counsel of his own choosing and the prejudice caused thereby.

WHEREFORE, the actions and orders of the illegal and unconstitutional four member panel of the Board chaired by Chairman Kauffman, and the actions of Board Counsel Keuch, on November 14, 1988 deprive respondent of his state and federal constitutional guarantees of counsel of his own choosing, as well as his guarantees of due process and equal protection of law; respondent therefore requests the Supreme Court to vacate the actions of the four member hearing panel on November 14, 1988 and to stay any and all further proceedings at Board Matter Number 140 until A. Charles Peruto is available to represent respondent.

XIII. APPLICATION TO DISQUALIFY CHAIRMAN KAUFFMAN AND ALL MEMBERS OF JUDICIAL INQUIRY AND REVIEW BOARD

144. Respondent has previously asked each of the Board members to disqualify themselves from these proceedings, and has asked the Supreme Court to disqualify each of the Board members, based, inter alia, on allegations that Chairman Kauffman was and is biased and hostile towards respondent and has prejudged all matters against respondent. *See* paragraphs 118-19 of Second Applications, incorporating and reiterating the averments and requests set forth in respondent's Initial Applications in the Supreme Court.

145. Respondent has alleged, in paragraphs 24 and 25 of said Initial Applications, that

> 24. During his term as a member and Chairman of this Board, Chairman Kauffman has actively, directly and indirectly, supported the candidacy of various political candidates for political office, including statewide judicial offices, in clear contravention of Canon 7 of the Code of Judicial Conduct, which provides that an officer of a judicial system performing

judicial functions should refrain from political activity inappropriate to his judicial office.

25. In his capacity as Chairman and Board member, Chairman Kauffman has never voted against any member of the judiciary that he has supported for judicial office.

146. The Board has failed to investigate or make inquiries into respondent's allegations concerning Chairman Kauffman's violations of these and other Canons of the Code of Judicial Conduct (Canons 1, 2 and 3A(4)) despite the explicit declaration by Board Counsel Keuch on behalf of the full Board that: "The rules of the Judicial Inquiry and Review Board and the Pennsylvania Constitutional provisions relating to the Board [i.e., Article V, sections 17 and 18] apply equally to all members of the Board." Brief for Board as Amicus Curiae In Support of Robert B. Surrick, Esquire, at Supreme Court Disc. Dkt. No. 2 No. 508, J-186-1988, at 7.

147. On November 7, 1988, Chairman Kauffman, with other members of the Pennsylvania Jewish Campaign Committee, caused to be printed in the Pittsburgh Press and other newspapers a full page paid political endorsement on behalf of Republican candidates in the November 8, 1988 general election. (A reduced copy of said full page endorsement is attached hereto as Exhibit AA.)

148. Said paid Republican political endorsement by Chairman Kauffman also violated Canon 7 of the Canons of the Code of Judicial Conduct.

149. Respondent is a Democrat.

150. Chairman Kauffman's appointment of himself to chair the unique, unprecedented and bizarre six member hearing panel to hear consolidated Charges I-V *ab initio*, his appointment of himself to chair the four member panel presiding on November 14, 1988, and his actions and conduct of the proceedings on November 14, 1988 (including the making of false factual assumptions and the unilateral, summary dismissal of respondent's various applications) demonstrate his actual bias and hostility to respondent and the prejudice resulting therefrom.

151. Chairman Kauffman's actual influence and his potential to influence the other members of the Board, and his power to manufacture a result adverse to respondent in this proceeding, has significantly escalated throughout these proceedings: whereas initially Chairman Kauffman was one of nine members of the Board having its mandated complement of five judges, two lawyers ("Justice" Kauffman, as he is referred to by the Board and its Counsel, is actually one of the lawyer members of the Board) and two laypersons, and was not a member of the three member hearing panel chaired by Judge Munley, Chairman Kauffman now wields considerable additional power and authority by virtue of the facts that: three of the five judge members of the Board have removed themselves from these proceedings; all prior proceedings have been aborted by the actions of the Board initiated by Chairman Kauffman (along with Judge Montemuro and Mrs. Scarlata) in adding new Charges III, IV and V on October 3, 1988 in the midst of the proceedings at Board Matter Number 140; Chairman Kauffman's maneuvering himself into position to appoint himself Chairman of the unique, unprecedented and bizarre six member hearing panel to hear consolidated Charges I-V *ab initio* puts him in the position of maximum authority and discretion (which allows for maximum abuse of authority and discretion) over these proceedings as he is able now to make unilateral rulings on legal matters and applications (as he did on November 14, 1988) and to admit and exclude evidence in an insidiously biased manner.

152. The Board's failure to investigate respondent's allegations against Chairman Kauffman indicates the actual bias and hostility of the remaining members of the Board against respondent, their susceptibility to the influence of Chairman Kauffman, and the inability of this Board to give respondent an adjudication before a tribunal having the appearance of impartiality.

WHEREFORE, respondent renews his application to disqualify Chairman Kauffman, and each and every member of the Board who have been contaminated by Chairman Kauffman's participation in these proceedings both on the record and behind the scenes, and reiterates his claim that the participation to date and continued participation in the future by

Chairman Kauffman and the other remaining members of the Board has deprived and will continue to deprive respondent of his constitutional and statutory rights to be judged by a fair and impartial tribunal of five judges, two lawyers and two lay-persons, and of his constitutional and statutory rights to due process and equal protection of law, to confidential proceedings, to counsel of his own choosing, to not be twice placed in jeopardy of punishment or prosecution for the same offense, and to justice, fundamental fairness and fair play.

XIV. DIRECTION TO BOARD COUNSEL KEUCH

153. The Supreme Court of Pennsylvania has decreed that its decision on respondent's Second Application will be "deferred pending receipt of further answer by counsel for the Board."

154. The Supreme Court has not set a time within which counsel for the Board shall file such further answer, and hearings have now been scheduled to commence in this matter on January 5, 1989.

WHEREFORE, respondent requests this Court to direct Board Counsel Keuch to file specific written answers to each of the averments set forth in said Second Applications and the instant Amendments, and to issue an order of Court directing that said written answers be filed within twenty days therefrom, and at least thirty days prior to the commencement of any further proceedings at Board Matter Number 140.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

AFFIDAVIT

OMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

---

ss:

BEFORE ME, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing AMENDMENTS TO SECOND APPLICATION FOR WRIT OF PROHIBITION AND/OR SECOND APPLICATION FOR EXTRAORDINARY RELIEF are true and correct to the best of his information, knowledge, and belief.

ROLF LARSEN
Rolf Larsen

Sworn to and subscribed
before me this 22nd day
of November, 1988.

BERNADETTE M. SEIBERT
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Amendments to Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief has been served on this date to the parties listed below by hand delivery in care of and addressed to Mr. Robert L. Keuch, Esquire, Executive Director and General Counsel of the Judicial Inquiry and Review Board at 225 Market Street, Harrisburg, PA 17101:

Judicial Inquiry and Review Board
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James E. Rowley
Honorable James M. Munley
Honorable Eunice L. Ross
James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Antonia L. Scarlata
Robert L. Keuch, Esquire

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

No. 138 Judicial Inquiry and Review Board Docket

ORDER

PER CURIAM:

AND NOW, this 21st day of December, 1988, upon consideration of the Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief, as amended, and the brief filed in opposition thereto, the Applications are hereby denied. *See First Amendment Coalition v. Judicial Inquiry and Review Board*, 501 Pa. 129, 460 A.2d 722 (1983); *Petition of Pennsylvania Bar Ass'n*, 501 Pa. 127, 460 A.2d 721 (1983); *see also Application of Surrick* ("XYZ" Case), 504 Pa. 25, 28-29, 470 A.2d 447, 448 (1983) (Zappala, J., concurring).

Mr. Justice Larsen did not participate in this matter.

Mr. Justice Zappala and Mr. Justice Papadakos dissent.

BEST AVAIL

with cust. corr. 5/10/93)

EDMUND B. SPAETH, JR.
207 Rex Avenue
Philadelphia, PA 19118
215-242-1291

March 3, 1990

The Honorable Robert P. Casey
Governor, State of Pennsylvania
The Capitol
Harrisburg, PA 17120

Dear Governor Casey:

I hereby resign as a member and Chairman of the Judicial Inquiry and Review Board. I do so because I have concluded that the structure of the Board is so fundamentally flawed that the Board cannot fulfill the responsibilities entrusted to it.

The basis of this conclusion is stated in the Report of the Governor's Judicial Reform Commission (of which, as you know, I was a member), submitted to you in January 1988. Four structural flaws in particular are identified in the Commission's Report.

First: As now consititued, the Board both investigates a complaint of misconduct by a judge and decides whether the complaint has merit. This is unfair both to the judge being investigated and to the Board. It is unfair to the judge because the judge cannot help but think that in deciding whether the complaint has merit, the Board will not confine itself to the evidence admitted at the hearing but will consider information learned in the course of the preliminary investigation but never offered at the hearing. It is unfair to the Board because no matter how resolutely the members of the Board seek to base their decision only on the evidence admitted at the hearing, they can do nothing to dispel the judge's suspicion or answer an allegation that they considered information learned in the course of the preliminary investigation. The Judicial Reform Commission therefore recommended (p. 87 of its Report) that the judicial discipline system should be reconstituted so that it is divided into two separate and independent parts: an

ABLE COPY

investigative division, within the executive branch, and an adjudicative division, within the judicial branch.

Second: The present combined investigative-adjudicative function of the Board might well raise a question whether its procedures were consistent with due process, except that a decision by the Board that judicial misconduct has occurred and a sanction should be imposed is recommendatory only; on appeal, the Supreme Court must conduct a de novo review, which is to say that the Court has the responsibility of making an independent review of the record created by the Board to determine for itself whether the charges have been established by clear and convincing evidence. The Board's recommendation has no binding effect on the Court but is merely advisory.

The usual rule in appellate proceedings is that an appellate court will defer to findings by the lower court, although of course it retains the power to set the findings aside because they are not supported by sufficient evidence or constitute an abuse of discretion. The reason for this rule is the common experience that one who sees a witness testify is in a better position to decide what weight to give that witness's testimony than one who only reads a transcript of the testimony. Not applying this rule to appeals in judicial discipline matters creates two difficulties than can only undermine public confidence in the efficiency and fairness of the judicial discipline system.

The first difficulty is that the importance of the Board's processes and decision is greatly diminished. No matter how conscientiously the Board attends to the evidence and formulates its recommendation, its findings and decision are entitled to no weight. The second difficulty is that the Supreme Court's de novo review may seem, at least to some, to be subjective. Where one justice may read a transcript as sufficient to establish the charges, another may read it as insufficient.

In recognition of these difficulties, the Judicial Reform Commission recommended (pages 105 & 110 of its Report) that the adjudicative division of the judicial discipline system should be required to file written decisions that include its findings of fact, conclusions of law, and discussion of reasons, and should be empowered to enter such order of removal from office, suspension, censure, or other discipline as authorized by the Pennsylvania Consititution and as warranted by the

record, and that on appeal, the Supreme Court should not review the record de novo but rather as it would review the record in a civil action in which the moving party has the burden of proving its allegations by clear and convincing evidence.

Third: As now constituted, the Board must conduct its operations in secrecy. It is only if the Board recommends a sanction that its record becomes public. This requirement of secrecy has been thought necessary to protect a judge against whom a complaint has been filed. It may, however, generate great suspicion as to whether the Board has conducted itself properly. Thus the Board is, so to speak, required to inflict its own wound. For if it concludes that no sanction should be recommended, it may prompt suspicions of misconduct; which because of its obligation of secrecy it is unable to respond to and allay. In recognition of this most unfortunate situation, the Judicial Reform Commission recommended (pages 98 & 105-06 of its Report) that in fairness to a judge against whom a complaint has been filed, all proceedings of the investigative division of the judicial discipline system should be confidential, unless and until a determination of probable cause is made and formal charges are filed, but that upon receipt of formal charges, the adjudicative division should schedule a hearing, which must be conducted in public. Justice Brandeis once observed that sunlight is the best disinfectant. Of no matter is that more true than of judicial discipline matters.

Fourth: The Board must conduct itself according to rules as promulgated by the Supreme Court. While of course the Board must conduct itself consistently with the Constitution and the Judicial Canons, if it is to fulfil its responsibilities it must be independent, able to conduct its proceedings in the manner that its experience demonstrates is appropriate to ensure both fairness and efficiency. The Judicial Reform Commission therefore recommended (pages 95, 103, 105, 106, and 112 of its Report) that the investigative division and the adjudicative division of the judicial discipline system should each have the power to promulgate its own rules of procedure; that each division should prepare and administer its own budget and hire staff as needed, the budget of the adjudicative division to be submitted to the General Assembly separately and not as an

item in the request by the Supreme Court on behalf of the judicial system generally; that the judicial discipline system should be assured by Constitutional provision that the General Assembly will appropriate sufficient funds to enable the prompt and fair adjudication of all complaints regarding judicial conduct; and that members of the Board, its chief counsel and staff should be absolutely immune from suit for all conduct in the course of their official duties.

It writing this letter I speak only for myself. I regret the conclusion that I have reached regarding the Board's ability to fulfill its responsibilities and any inconvenience my resignation may cause the Board. Perhaps I should have declined appointment to the Board, but that's hindsight — always sharper than foresight. I do not mean in any way to suggest any criticism of any member of the Board, or of its Executive Director and Chief Counsel, or of its staff. To the contrary, to my observation all of these individuals have conscientiously sought to fulfill the responsibilities imposed on them. It has been a privilege and an honor to serve on the Board. Thank you for your expression of confidence in appointing me.

After an interval to permit transmission of this letter to you, I plan to release it to the press. Nothing is more important to the welfare of the Commonwealth and its citizens than a justified confidence in the judicial discipline system. Public discussion of that system is therefore in the interest of all. Of course, my letter may prompt no public discussion, and also, I recognize that by no means will everyone agree with what I have said. Still, some public discussion regarding whether the Board should be restructured has already occurred, and some more, I hope, will occur. There are now pending in the General Assembly bills that would restructure the judicial discipline system along the lines recommended by the Judicial Reform Commission, and further discussion may direct greater public attention to those bills. May I, in any event, express the hope that you will examine the recommendations of the Judicial Reform Commission regarding restructuring the judicial discipline system, and to the extent that you find them persua-

sive, encourage their implementation.

Respectfully,

EDMUND B. SPAETH, JR.

Edmund B. Spaeth, Jr.

cc: The Members of the Judicial Inquiry and Review Board
The Executive Director and Chief Counsel of the Board

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

---

ss:

I, RICHARD A. SPRAGUE, ESQUIRE, being duly sworn according to law, depose and state that I am an attorney-at-law, admitted to practice law in the Commonwealth of Pennsylvania. Sometime during the Fall of 1980, I was appointed Special Counsel to head an investigation into alleged charges of official misconduct on the part of Justice Rolf Larsen in connection with his official duties on the Supreme Court of Pennsylvania. This appointment as Special Counsel was by the then Chief Justice of Pennsylvania, Honorable Henry X. O'Brien, as well as the Judicial Inquiry & Review Board of Pennsylvania.

Shortly after I received the appointment and upon undertaking my duties and responsibilities as Special Counsel in the Larsen matter, I was advised by Richard E. McDevitt, Esquire, then the Executive Director of the Judicial Inquiry & Review Board, that Justice Bruce W. Kauffman, at that time also a Justice of the Supreme Court of Pennsylvania, had furnished Mr. McDevitt information against Justice Larsen relative to the allegations of official misconduct by Justice Larsen that the Judicial Inquiry & Review Board was looking into at that time. Mr. McDevitt suggested that I, as recently appointed Special Counsel in the Larsen matter, personally contact and interview Justice Kauffman in order to investigate and determine in greater detail what information Justice Kaufmann possessed regarding the allegations of official misconduct in office by Justice Larsen.

Pursuant to that suggestion by Mr. McDevitt, I did, in fact, personally meet with then Justice Bruce W. Kauffman on numerous occasions during the investigation stages of the proceeding, during preparation for the presentation of testimony at the preliminary hearing in the Larsen matter and during preparation of the final hearing before the Board relative to the formal charges that were, in fact, ultimately filed against

Justice Larsen by the Judicial Inquiry & Review board. During these meetings between Justice Kauffman and myself, I conducted direct face-to-face interviews with him and personally discussed his personal views concerning Justice Larsen as well as what information that he felt that he had that would be helpful to me as special Counsel in my investigation and presentation of evidence concerning Justice Larsen before the Judicial Inquiry & Review Board.

During the course of those numerous meetings that I had with Justice Kauffman concerning the Larsen matter, Justice Kauffman frequently expressed to me his personal dislike of and his personal antagonism towards Justice Rolf Larsen. On a number of occasions during these meetings, Justice Kaufmann expressed to me his personal disdain for and personal animosity towards Justice Larsen and told me of his unalterable personal view that Justice Larsen had to be removed from the Supreme Court because he (Justice Kauffman) regarded Justice Larsen "as a dangerous person," "as having mental and emotional problems," "as an evil person," etc.

Justice Kauffman indicated to me that because of his dislike of Justice Larsen and because he felt the need for Justice Larsen to be removed from the Supreme Court, he, Justice Kauffman, had given information detrimental to Justice Larsen to The Philadelphia Inquirer.

It was obvious to me that Justice Kauffman was determined to do everything that was within his power to aid in having Justice Larsen removed from the Supreme Court of Pennsylvania. However, it should be noted that although Justice Kauffman was most desirous to be furnishing information against Justice Larsen, when it came time to testify face to face against Justice Larsen, Justice Kauffman did everything he could to avoid that direct confrontation and tried to water down his testimony.

From my contacts with Justice Kauffman, it is my opinion that Justice Kauffman could not be fair and impartial in any review of allegations against Justice Larsen concerning Justice Larsen's conduct on the Supreme Court of Pennsylvania. Furthermore, from my own contacts with Justice Kauffman and in view of what I have stated above, there would clearly be an appearance of impropriety in having Justice Kauffman have

any connection with the review of allegations of misconduct by Justice Larsen.

The foregoing statement, consisting of three (3) typewritten pages, has been read by me and the information contained herein is true and correct to the best of my present knowledge, information and belief.

RICHARD A. SPRAGUE

Richard A. Sprague, Esquire

SWORN TO AND SUBSCRIBED before me this 9th day of June, 1988.

FREDALEE SHENK

Fredalee Shenk, Notary Public

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN THE MATTER OF
JUDICIAL INQUIRY AND REVIEW BOARD
MATTER NUMBER 140

ORDER

AND NOW, this 11th day of October, 1988, after hearing argument and after due deliberation, the Board, with six members sitting, unanimously finds that:

1) The charges filed on October 3, 1988 shall be deemed to have been filed pursuant to Judicial Inquiry and Review Board Rule of Procedure 2 rather than Judicial Inquiry and Review Board Rule of Procedure 8. Accordingly, Respondent shall have the right to file a written answer to said charges on or before October 24, 1988.

2) The October 3, 1988 charges were correctly and properly issued.

3) In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on that matter.

BY THE JUDICIAL INQUIRY
AND REVIEW BOARD:

BRUCE W. KAUFFMAN

Bruce W. Kauffman
Chairman

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN THE MATTER OF
HONORABLE ROLF LARSEN

BOARD MATTER NUMBER 140

ORDER

AND NOW, this 31st day of October, 1988, after due deliberation, the Board, with six members sitting, unanimously holds that:

1. Respondent's Application For a Stay of All Proceedings is denied;

2. Respondent's Notice to Plead is quashed since there is no basis for such a pleading or notice under the Rules of Procedure issued by the Supreme Court of Pennsylvania for the Judicial Inquiry and Review Board;

3. Respondent's Request for Oral Argument on the Supplemental Omnibus Application is denied;

4. Respondent's Application to Quash Additional Formal Charges III, IV and V is denied;

5. Respondent's Application for a Stay of Proceedings or Dismissal is denied;

6. Respondent's Application to Sever Charges is denied;

7. Respondent's Application for Dismissal of Charges III, IV and V for Lack of Specificity or Alternatively, More Specific Charges or For a Pleading in the Nature of a Bill of Particulars is denied except that the Board, following prior practices, will, upon the request of the Respondent's Counsel, provide the information and the identity of the witnesses it intends to present in its case in chief concerning the matters raised in Respondent's Application;

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

No. 92-1833

In The

Supreme Court of the United States

October Term, 1992

ROLF LARSEN,

Petitioner,

v.

JUDICIAL INQUIRY AND REVIEW BOARD OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT L. KEUCH, ESQUIRE
Solicitor
Judicial Inquiry and Review Board
Attorney for Respondent

225 Market Street
Harrisburg, Pennsylvania 17101
(717) 234-7911

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the fact that the Respondent Board, in accordance with the Pennsylvania Constitution and the Rules promulgated pursuant to the constitutional mandates, investigates charges against a member of the judiciary, prefers charges and holds evidentiary hearings, and, when appropriate, suggests recommended findings and sanctions to the Supreme Court raises due process concerns where the Pennsylvania Constitution expressly requires its Supreme Court to conduct its own review of the record and to make the final adjudicative decision as to whether or not a judicial officer has violated the Constitution or the Code of Conduct and, if so, what level of discipline is appropriate.

II. Whether Petitioner's claim that, during judicial disciplinary proceedings involving Petitioner, the Respondent Board amended the charges to issue additional charges constitutes a violation of the Double Jeopardy clause which protects a criminal defendant from being retried for the same criminal offense has any basis in law or, on this record, in fact.

III. Whether the fact that, during judicial disciplinary proceedings initiated against Petitioner a justice of the state's highest court, for, *inter alia*, *ex parte* communication to a lower court judge regarding a matter then before the lower court, the Respondent Board amended the charges to include additional *ex parte* communications under similar circumstances raises due process concerns where such amendments were authorized by the rules of procedure promulgated by the court on which Petitioner sits and Petitioner had more than ample time to prepare and present his defense against the additional charges.

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OPINIONS BELOW

The Final Report and Recommendation of the Respondent Judicial Inquiry and Review Board is set forth in the Petitioner's Appendix pp. 9-71, 74-150. The Order of the Pennsylvania Supreme Court adopting the Board's recommendation that Petitioner be publicly reprimanded for violating the Code of Judicial Conduct is reported at ___ Pa. ___, 616 A.2d 529 (1993), and is set forth in Petitioner's Appendix pp. 7-8. The Order of the Pennsylvania Supreme Court denying Petitioner's petition for reargument is reported at ___ Pa. ___, ___ A.2d ___, (1993) and is set forth in Petitioner's Appendix pp. 1-6.

JURISDICTION

The final judgment of the Pennsylvania Supreme Court was entered on January 22, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article V, Section 18 of the Constitution of Pennsylvania, provides in pertinent part:

> § 18. Suspension, removal, discipline and compulsory retirement.
>
> (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

(b) . . . The board shall act only with the concurrence of a majority of its members.

. . . .

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section 17 of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justices or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

(f) The board, after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a justice or judge. The board's orders for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the

law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper.

. . .

(j) The Supreme Court shall prescribe rules of procedure under this section.

. . .

The Rules of Procedure governing the Judicial Inquiry and Review Board promulgated by the Pennsylvania Supreme Court and applicable to the proceedings below, provided in pertinent part:

Rule 1. Preliminary Investigation

(a) The Board, of its own volition, or upon receiving a statement not obviously unfounded or frivolous, alleging facts indicating that a judge may be subject to suspension, removal, discipline or compulsory retirement upon the grounds specified in Article V, Section 17-18 of the Constitution of the Commonwealth of Pennsylvania, or for violations of the Canons of legal or judicial ethics or Standards of Conduct prescribed by the Supreme Court, shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held.

. . .

Rule 2. Notice of Formal Proceedings

(a) After the investigation has been completed, if the Board concludes that formal proceedings should be instituted, the Board shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him.

. . .

Rule 5. Hearing

(d) The hearing shall be held before a Committee of the Board consisting of not less than three (3) members, at least one of whom shall be a judge.

. . .

Rule 8. Amendments to Notice or Answer

The Board, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

. . .

Rule 9. Report of Committee to Board

(a) After the conclusion of the hearing before the Committee of the Board, the Committee shall promptly prepare and transmit a report to the Board.

(b) Upon receiving the report of the Committee, the Board shall make its findings and report and promptly mail a copy to the judge.

. . .

Rule 14. Board Vote

If the Board, upon consideration of the record of the proceedings, finds good cause, it shall recommend to the Supreme Court

> the suspension, removal, discipline or compulsory retirement of the judge. The affirmative vote of a majority of the Board shall be necessary for such recommendation or for dismissal of the proceedings. A member of the Board may not abstain from voting.
>
> . . .
>
> Rule 18. Disposition
>
> The Supreme Court shall review the record of the Board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper, or may refer the matter back to the Board for further proceedings.

COUNTERSTATEMENT OF THE CASE

This case involves judicial disciplinary proceedings resulting in the issuance of a public reprimand to Petitioner, a justice of the Pennsylvania Supreme Court, the state's highest appellate tribunal. The reprimand was issued by the Pennsylvania Supreme Court following its review of proceedings conducted by the agency entrusted by the State Constitution with investigating alleged judicial misconduct, the Judicial Inquiry and Review Board.

Pennsylvania's procedures are set forth in the Constitutional and statutory provisions involved, *supra*, pp. 1 to 5.[1] The Constitution and the Rules provide for a nine member Review Board constituted of five judges, two attorneys and two lay people and charges it with keeping informed as to matters relating to grounds for judicial

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[1] They are substantially identical to those found in approximately 24 other states, see discussion below, pp. 13-14.

discipline and with receiving complaints or reports regarding such matters. The Board is required to conduct investigations and, when appropriate after such investigation, to issue charges and hold hearings and, if after such hearing, it finds good cause, it is mandated to recommend discipline to the state's Supreme Court. The Court must conduct its own *de novo* review of the record of the Board's proceedings and make its own determinations on the facts and the law and accept, reject or modify the Board's recommendation as it, the Supreme Court, finds just and proper.

The Proceedings before the Board involving Petitioner were initiated on May 24, 1988, with the issuance, by the Board, of a Notice of Formal Proceedings notifying Petitioner that proceedings had been instituted on two charges of misconduct one of which concerned allegations that Petitioner had initiated an *ex parte* contact with a lower court judge concerning a matter then before the judge. Petitioner answered the Notice and Charges with a simple denial, and a hearing on the charges was begun on August 22, 1988.

Following nine days of hearings before a hearing panel of three members of the Board during August and September, the hearings were adjourned on September 14, 1988 with a planned resumption on October 5, 1988. Petitioner had not testified but was expected to testify on his own behalf when the hearings resumed.

Following the adjournment on September 14, and prior to the planned resumption of the proceedings on October 5, Board Counsel obtained information independently of the hearing which indicated a possible need for additional related charges involving *ex parte* contacts by Petitioner with a second lower court judge concerning matters then before the judge.

Board Counsel reported the information, obtained in interviews of September 27, 29, and 30, to the Chairman of the Board and a meeting of the Board was held on

Monday, October 3, to consider what action, if any, the Board should take. Only three Board members were available to participate. At the time, there was one vacancy on the nine member Board. Two members of the Board were recused because they were witnesses in the proceedings. Because Petitioner previously had objected to the participation of the hearing panel members in Board deliberations concerning him, the three hearing panel members chose not to participate in this vote.[2] Therefore, the remaining three Board members considered the matter and voted to amend the previously served Notice of Institution of Formal Proceedings by setting forth three additional charges alleging *ex parte* contacts.

The Board's action was taken pursuant to Rules 2 and 8 of the J.I.R.B. Rules of Procedure set forth, *supra* at pp. 3, 4. Rule 8 provides that, if the Notice of Formal Proceedings is amended, a respondent "shall be given reasonable time. . . . to prepare and present his defense against the matters charged thereby". Anticipating that Petitioner would request additional time, Board Counsel suggested to Petitioner's Counsel that the hearing scheduled for October 5, 1988, be replaced with a conference call with the hearing panel, and stated that Board Counsel would join in any request to the Board for a continuance.

Petitioner's Counsel agreed to the conference call procedure and, in the call with the hearing panel, argued that Rule 8 does not permit the procedure followed by the Board. Petitioner's Counsel also raised the question whether three members of the Board could act under such circumstances. Finally, he asked for the opportunity to present legal arguments before the entire Board.

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[2] Their participation would have been totally appropriate under the applicable Rules and the applicable legal precedents, see discussion below at pp. 13-18.

Following the conference call argument, the hearing panel consulted and, later the same day, directed Board Counsel to arrange a conference call with the three members of the Board who had issued the amendment pursuant to Rule 8 to permit presentation of Petitioner's arguments. The call was held the next morning, October 6. Following argument, the three Board members ordered that argument be heard before the entire Board on October 10, 1988.[3] The six non-recused members of the Board heard three and one-half hours of argument on the issues and unanimously issued an order (Pet. App. p. 286) stating, *inter alia*, that the charges issued on October 3, 1988, were correctly and properly issued and that the charges filed on October 3, 1988, shall be deemed to have been filed pursuant to Rule 2 (which provides for 20 days to answer a Notice of Formal Proceedings) rather than Rule 8 (which provides for a "reasonable" time to answer). The Order also stated:

> (3) In the event the Board concludes a hearing is necessary concerning the October 3, 1988, charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on the matter.

Petitioner filed an application with the Board challenging the Board's actions and, when the Board denied the application, he filed an application for extraordinary relief with the State Supreme Court challenging the procedures. A stay was issued by one Justice, but was ultimately vacated by action of the Court. Petitioner then filed an action in the United States District Court for the

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[3] At Petitioner's request, the two recused members were asked to participate. Both declined.

Middle District of Pennsylvania challenging the Board's procedures. The Court denied Petitioner's request for a temporary restraining order.

The Proceedings below then resumed on November 14, 1988. Neither Petitioner nor his regular counsel, Mr. A. Charles Peruto, was present. However, Petitioner was represented by other counsel who entered Mr. Peruto's trial schedule as an exhibit and then objected to the hearing going forward on various grounds. The Board overruled the objections and the Chairman then stated (Notes of Testimony 1824, *et seq.*):

> . . . [S]o far as a continuance is concerned, the continuance is granted in light of Mr. Peruto's unavailability since he is engaged in a trial in progress in the Federal Court which will not be over until December 2nd.
>
> We do want to, however, schedule some days for hearing, and we would appreciate it if you would ask Mr. Peruto and Justice Larsen if they would let us know what parts, if any, of the previous hearing they expect to enter into the record here without redoing it, if there is any. In fact, what I would propose is that we order [Board Counsel] to meet with Mr. Peruto or whoever Mr. Peruto designates to meet in his stead sometime during this continuance which will be granted, to reach agreement, if possible, on those parts of the record, if any, which respondent agrees should be made part of the record of this hearing, and so that it is clear, our order is that this hearing is *de novo* and, therefore, the respondent will have to consider what parts, if any, of the previous hearing on charges one and two should be made part of the record of this hearing . . .

The hearing was then recessed until January 5 and, by later Board order, was further continued until March 13, 1989. At that time, Petitioner stipulated that the

record made before the original hearing panel would be incorporated into the record being made before the *en banc* hearing panel and the proceedings resumed with Board Counsel presenting evidence related to the additional three charges. (See Notes of Testimony set forth in the Appendix, *infra* at p. 4a.) Eight additional days of testimony were held between March 13, 1989, and April 21, 1989, when the record was closed. Upon motion of Petitioner, the record was reopened for a hearing on June 10, 1989. Following the exchange of proposed findings by both Petitioner and Board Counsel, oral argument was heard on July 25, 1989. The Board then undertook its review of the record and the arguments made.

In April, 1990, the Board issued its proposed determination or recommendation. It found that one of the two original charges had been established by clear and convincing evidence, that the other did not, as a matter of law, constitute judicial misconduct and that the three additional charges had not been established by clear and convincing evidence. The recommendation was joined by eight members of the nine member Board with one Board member dissenting from the finding of misconduct.[4]

Under the Board's procedures, oral argument was heard by the Board on objections to the Board's proposed

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[4] During the pendency of the hearings, one Board member had resigned. He was replaced by Judge Charles Durham who was appointed on December 9, 1988. Two Board members had recused themselves and, when their terms ended, they were replaced by Superior Court Judge John Kelly who was appointed on December 9, 1988, and by Judge Jess Jiuliante who was appointed on March 15, 1990. Since the members they were replacing were, for the reasons noted, unavailable to participate in this matter, Judges Kelly, Durham and Jiuliante became members of the Board participating in Board Matter 140. Judge Durham died before the board's final determination and was replaced by Judge Joseph James.

report. Following its consideration of the arguments of Petitioner and Board Counsel, the Board reaffirmed its earlier determinations and filed its Report and Recommendation with the Supreme Court on July 17, 1991. The Board's report consisted of three parts: two opinions joined by four members each which found that one of the original two charges had been established by the evidence, that the conduct charged in the other original charge did not, as a matter of law, constitute judicial misconduct, and that the evidence was insufficient as to the three additional charges[5] and a dissenting opinion by one member who found that no misconduct occurred. The eight members who determined that the evidence did establish misconduct recommended the sanction of public reprimand.

Upon receipt of the Board's recommendation, the Supreme Court noticed a briefing schedule and heard oral argument. On October 14, 1992, the Court issued its order adopting, by reference and by including it as an appendix to its Order, the findings and recommendation of the Board as set forth in one of the two majority opinions. Petitioner filed a motion for reargument which was denied by the Court.

SUMMARY OF ARGUMENT

I. The procedures mandated by the Pennsylvania Constitution which require the Respondent Board to investigate allegations of judicial misconduct, to order and hold evidentiary hearings on such allegations when the Board deems it necessary, and to make disciplinary recommendations to the State Supreme Court if the Board

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[5] As noted by the authors of one of the two opinions, the "principle point of divergence" between the two reports is the treatment of the character evidence submitted by Petitioner (Pet. App. pp. 22-23).

believes the evidence produced at the hearing establishes misconduct do not constitute impermissible commingling of investigative, prosecutorial, and adjudicative functions because the State Supreme Court, not the Board, is the final adjudicative authority and the Court is required to conduct its own *de novo* review of the record. Similar procedures are in effect in approximately 24 states and "commingling" attacks on this structure of judicial discipline have been rejected by every court which has considered the question, including this Court.

II. The issuance of additional charges in the proceedings below raises no double jeopardy or other constitutional issue. Judicial disciplinary proceedings are not criminal proceedings and do not involve criminally punishing an individual. Such proceedings are to protect the integrity of the judicial system, not to determine criminal guilt, and double jeopardy concepts do not apply. Moreover, Petitioner was not tried a second time on the original charges since he stipulated that the record created in the hearing as to those charges before the original hearing panel be incorporated into the *de novo en banc* hearing ordered by the Respondent Board as to all the charges and, under the constitutionally mandated procedures, it is the Board, and not a hearing panel, who must make the determination as to whether or not to recommend disciplinary action to the State Supreme Court.

III. These latter considerations also provide an answer to the Petitioner's allegations that the Board improperly issued additional charges during the proceedings below and that this prejudiced him. The actions of the Board conformed with its Rules and Petitioner can demonstrate no prejudice from the issuance of additional charges in light of the proper roles of the Board and the State Supreme Court. The procedures followed by the Board in amending the original charges have been validated by every court that has considered them against challenges similar to Petitioner's and the Board was

properly fulfilling its constitutionally imposed responsibilities in pursuing additional instances of possible judicial misconduct. The charges were based on information developed independently of the ongoing proceedings, were issued before Petitioner testified and Petitioner had more than ample time, approximately five months, to meet and defend against the additional charges. Thus, Petitioner was provided procedural due process.

ARGUMENT

I. THE PROCEDURES OF THE BOARD AS MANDATED BY THE STATE CONSTITUTION DO NOT CONSTITUTE IMPERMISSIBLE COMMINGLING OF INVESTIGATIVE, PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS

Petitioner's contention that the procedures mandated for the Respondent Board by the Constitution of Pennsylvania are constitutionally invalid in that they provide for a commingling of investigative, prosecutorial and adjudicative functions has previously been rejected by this Court. In *White v. Judicial Inquiry and Review Board*, 488 U.S. 805 (1988), the Appellant challenged the decision of the Pennsylvania Supreme Court in *In re Cunningham*, 517 Pa. 417, 538 A.2d 473 (Pa.1988), which removed him from office following disciplinary proceedings before the Respondent Board. The appeal, based primarily on the commingling issue, was dismissed by this Court for want of a substantial federal question.

The contention remains without merit.[6] In addition to its rejection by this Court, it has been rejected in every

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[6] The contention as to Pennsylvania's disciplinary system will also soon be moot. On May 18, 1993, the voters of Pennsylvania approved a constitutional amendment which will, *inter alia*, create a two-tier disciplinary system by providing for a Judicial Conduct Board to exercise investigative and prosecutorial functions and a separate Judicial Court to hear charges brought by the Board.

state with a scheme of judicial discipline similar to Pennsylvania's. The Board's procedures mandated by Article V, Section 18, of the State Constitution and by the Rules are identical to those presently found in approximately 24 jurisdictions, see *In re Hanson*, 532 P.2d 303 (Alas. 1975), in which the Supreme Court of Alaska, after reviewing the history of "commingling" attacks on this structure of judicial discipline, concluded that the argument has been rejected by "all courts which have considered the question." See, *e.g.*, *In re Inquiry Relating to Rome*, 218 Kan. 198, 542 P.2d 676 (1975); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977); *In re Brown*, 512 S.W.2d 317 (Tex. 1974); *In re Mills*, 539 S.W.2d 447 (Mo. 1976); *In re Diener and Broccolino*, 268 Md. 659, 304 A.2d 587 (1973).

In the *Rome* case, the Supreme Court of Kansas rejected the "commingling" argument with the following language:

> "We think that reposal in the Commission of the dual functions of investigations and in making findings and recommendations . . . does not result in a biased or partial tribunal violative of the judge's Constitutional procedural right. The Commission's findings and recommendations are advisory only." 542 P.2d at 684.

Similarly, the Supreme Court of North Carolina in the *Nowell* case, *supra*, held that " . . . [a]n agency which has only the power to recommend penalties is not required to establish an independent, investigatory and adjudicatory staff." The Supreme Court of Texas in the *Brown* case, *supra*, wrote that "any alleged partiality of the Commission is cured by the final scrutiny of this adjudicative body."[7]

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[7] The Pennsylvania Supreme Court has repeatedly stressed the merely advisory nature of the Board's recommendations, See, *e.g. In re Glancey*, 515 Pa. 201, 527 A.2d 997 (1987); *In re*

The due process "commingling" argument in the circumstances presented here has also been rejected by all the federal courts in which it has been advanced, including, of course, this Court. In *Roy v. Jones*, 349 F.Supp. 315 (W.D. Pa. 1972), *aff'd. on other grounds*, 484 F.2d 96 (3d Cir. 1973), the District court wrote, " . . . [e]ven if the Board is biased, which this Court finds it is not, the determination made by the Board will not be a final adjudication; it will merely be a recommendation which may be approved or disapproved by the Supreme Court [of Pennsylvania]", quoting *Keiser v. Bell*, 332 F.Supp. at 608 (E.D. Pa. 1971).[8]

Cunningham, 517 Pa. 417, 538 A.2d 473 (Pa.1988); *In re Chiovero*, 524 Pa. 87, 570 A.2d 57 (1990). In *Glancey, supra*, the Court stated (527 A.2d at 1005):

> . . . [T]he Board's recommendation has no binding effect on this Court; it is merely advisory at best, and comes here with no special presumption in its favor. Article V, § 18(h), of the State Constitution expressly provides that we may totally reject the recommendation, if in our view, it is "just and proper" to do so. In sum, it is the obligation of this Court to determine a judicial officer has in fact breached the trust reposed in him and the appropriate sanction for such a violation.

In exercising its responsibilities the Court can, and does, reject the Board's view of the Record, see *Chiovero, supra*, including the credibility of the testimony, see *In re Braig*, 520 Pa. 409, 554 A.2d 493 (1989); *In re Sylvester*, 521 Pa. 300, 555 A.2d 1202 (1989).

[8] The careful, detailed review by the Board of the testimony of Judge Ross who was a Board Member and a material witness, see, *e.g.* Pet. App. pp. 23-29, 37-63, is a full answer to Petitioner's allegations that the Board can not fairly evaluate the evidence of its own members. Moreover, to accept Petitioner's contention would be to hold that the Board was disqualified from taking disciplinary actions in any matter in which one of its members had relevant, material information.

Petitioner's allegations that Judge Ross participated in a review of the underlying facts of the complaint she made

In *Keiser v. Bell* the Federal District Court for the Eastern District of Pennsylvania was faced with a case in which the then Executive Director of the J.I.R.B. had sworn out the complaint, had participated as a member of the fact-finding committee, and had voted as a J.I.R.B. member on the recommendation for discipline. Judge Higginbottam held the "commingling" due process argument to be "plainly insubstantial", given the "clear separation of preliminary investigative and final adjudicatory functions." 332 F.Supp at 619.[9]

In *Witherow v. Larkin*, 421 U.S. 35 (1975), this Court found no due process violations in the procedures of a state licensing board that first issued formal findings of fact and conclusions of law asserting probable cause to believe that the petitioner had engaged in various acts prohibited by the statutes and then, as it had the power to do, proceeded to finally adjudicate the matter and impose punishment. We would note again that the Judicial Inquiry and Review Board can not issue final adjudications and this distinction is a critical and conclusive

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against Petitioner (Pet.App., pp. 16 and 17) are in error. Judge Ross recused herself from any participation in the proceedings involving Petitioner once it was determined that the inquiry into his conduct would include allegations concerning the contact with Judge Ross. See Appendix, *infra*, p. 1.

[9] In contrast, the present Executive Director and General Counsel did not and does not sit as a member of the Board or any of its committees, did not bring the complaint, did not vote and did not otherwise participate in the deliberations of the Board concerning its legal rulings, its findings of fact, or its proposed recommendations. Nor did the Executive Director and General Counsel exercise any other adjudicative function. The state Constitution, Article V, Section 18(b) set forth *supra*, at page 2, provides that the Board shall act only with a concurrence of its members. Any orders and other rulings signed by Counsel were issued only at the direction of the Board and following the necessary approval.

one. *Witherow* also specifically approved and reaffirmed this Court's holding in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), which is also dispositive of the issues raised by Petitioner.[10]

Petitioner's attempt to avoid the compelling authority against his contention by alleging that the Court below did not conduct a *de novo* review of the record asks this Court to assume that the Pennsylvania Supreme Court failed to exercise its constitutionally mandated responsibilities, responsibilities it has repeatedly recognized and stressed, see note 7, *supra*, and the cases there

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[10] Among the arguments rejected by this Court in *Cement Institute* was petitioner's claim that it was a denial of due process for the commission to pass on the issue of alleged violations of the anti-trust laws by petitioner on the grounds that the Commission had, in public statements including Congressional testimony, expressed the belief that petitioner's conduct had violated the law. In rejecting this contention, the Court noted that the fact that the Commission's members had entertained such views as a result of prior *ex parte* investigations did not mean that the minds of the Commission's members were made up and did not require disqualification of the Commission (*Id*, at 700-703). The Court also stated that:

> " . . . [No] decision of the Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although those issues involve questions both of law and fact. Certainly, the . . . Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." (*Id*, at 703.)

cited. There is absolutely no basis for such an assumption.[11]

The order of the Court accepting a part of the Board's recommended findings and agreeing with the recommended sanction specifically states that the order was issued "after review of the record and due consideration of the brief and arguments . . . " (Pet. App. p. 7). In its order denying reargument, the Court stated: "There is no basis for the claim in the application for reargument that we failed to conduct a *de novo* review." (Pet. App. p. 1).

II. THE AMENDMENT OF THE DISCIPLINARY CHARGES INVOLVING PETITIONER DOES NOT RAISE CONSTITUTIONAL ISSUES.

As set forth in more detail in the Counterstatement, *supra*, pp. 6-9, during the evidentiary hearings upon the original two charges of judicial misconduct that had been filed against Petitioner, additional information was developed independent of the hearings then being conducted before a three person hearing panel of the Board which resulted in the issuance of three additional charges by amendment to the original Notice of Institution of Formal Proceedings. At the time of the issuance of the three additional charges, Respondent had not testified at the

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[11] While Petitioner notes that the Court has, in other matters, issued opinions discussing the record, he fails to note that the Court has also, in other cases, issued orders accepting or approving the Board's Report and Recommendations, even in cases resulting in removal. See the orders in *In re Morgo*, Pa. Supreme Court JIRB Docket No. 139, filed November 28, 1991, and in *In re Stewart*, Pa. Supreme Court JIRB Docket No. 148, filed January 27, 1992. Moreover, the Court's opinion below incorporated the detailed and extensive Board report which it accepted.

hearing,[12] and the evidentiary hearings on the additional charges did not commence until approximately five months after their issuance. Petitioner's challenges to this procedure on double jeopardy and due process grounds have no basis in law or fact and do not merit review by this Court.

A. There is no Legal or Factual Basis for Petitioner's Double Jeopardy Claim.

The constitutional prohibition against double jeopardy applies to criminal matters and prohibits *criminally* punishing twice, or attempting to punish twice, for the same criminal offense. More to the point, the prohibition applies *only* to criminal matters, see *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972) and see *Lowery v. Com. Pa. State Police*, 108 Pa.Comwlth. 183, 529 A.2d 589 (1987); *Com. Pa. State Police v. Swaydis*, 504 Pa. 19, 470 A.2d 107 (1983).

While, as Petitioner notes, judicial disciplinary proceedings have been referred to as *quasi*-criminal in nature, such disciplinary proceedings are neither civil nor criminal, but are *sui generis*. The focus of such proceedings is not the punishment of an individual, but the

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[12] Nor had any other evidence been presented which related to the additional charges. As Petitioner himself notes (Pet. p. 7), the charges pertained "to entirely different times, places, subject matter and parties from the times, places subject matter and parties allegedly involved in [the original two charges]".

As set forth above, Counterstatement pp. 6-9, the additional charges did involve, as did one of the original charges, *ex parte* communications with a lower court judge concerning matters before the lower court, but the communications in question were with a different judge and involved different cases, though one of the three did involve an attorney also involved in the *ex parte* communications in the original charges.

protection of the integrity of our judicial system and the preservation of the public's confidence in that integrity. See *e. g., Keiser v. Bell,* 332 F. Supp 608 (E.D. Pa. 1971); *Matter of Probert,* 411 Mich. 210, 308 N.W.2d 773, 777, note 10 (Mich. 1984); *Complaint Concerning Winton,* 350 N.W.2d 337, 342 (Minn. 1984); and *In Re Haggerty,* 241 S.2d 469, 474 (La. 1970).

As the federal court stated in *Keiser v. Bell, supra,* referring to the respondent Board (332 F. Supp. 608, 616):

> The proceedings of the Judicial Board are investigatory and advisory and are not binding upon the Supreme Court. No determination of criminal guilt is made, but merely a determination of the Judicial Board's view of the conformity of the subject of investigation to the state constitutional standards for judicial office. Similarly, the resulting Order of the Supreme Court does not operate as a sanction for criminal guilt but as a judgment on judicial fitness. At most, the proceedings of the Judicial Board could be characterized as quasi-judicial administrative hearings, and the Order of the Supreme court as a judicial disciplinary order.

Judicial disciplinary proceedings are *not* criminal proceedings and double jeopardy does not apply. See, e.g., *Matter of Probert, supra,* 308 N.W. 2d at 776, note 7; *In re Inquiry of Kelley,* 238 S.2d 565, 570 (Fla. 1970); *In re Inquiry of Lee,* 336 S.2d 1175, 1177 (Fla. 1976).

Moreover, Petitioner was not tried twice on the same charges. Under the procedures provided for the Respondent Board by the Court on which Petitioner sits, the Board is permitted to develop a hearing record before a panel of at least three Board members (see Rule 5, *supra,* p. 4). At the conclusion of the hearing, the panel reports to the Board at which point the *Board* makes findings and ultimately decides, based on its review of the record of the proceedings, if there is good cause to recommend

discipline to the Supreme Court (See Rules 9 and 14, *supra*, pp. 4-5).

As detailed in the Counterstatement, *supra*, pp. 6-9, when Petitioner objected to the issuance of the additional charges against him, the Board, following argument before it, issued an order (Pet. App. p. 268) in which it found that the charges had been issued correctly and properly pursuant to its rules (see Rule 8, *supra*, p. 4). The order also provided that the charges would be consolidated with the original charges and all charges would be heard *ab initio* by the entire Board eligible to sit. However, when the hearings resumed, the new *en banc* hearing panel, in granting a continuance due to Petitioner's counsel's unavailability, asked that Petitioner advise the Board what parts, if any, of the record of the previous hearing he expected to enter into the record of the hearing before the *en banc* panel. When the continued hearings resumed, Petitioner chose to go forward from the point of the end of the hearings before the three member panel. (See Notes of Transcripts for November 14, 1988, and March 13, 1989, set forth in the Appendix, *infra*, pp. 3a-4a). In short, Petitioner was not tried twice on the original two charges, but was procedurally in no different posture than if the three new charges had been heard in a separate hearing and the Board, in accordance with its Rules, had then considered the record of both hearings and made its ultimate determination.

B. THE ADDITIONAL CHARGES RAISE NO DUE PROCESS OR OTHER CONSTITUTIONAL ISSUE.

The factual context and the procedural considerations just discussed, pp. 18-19 and pp. 20-21, *supra*, also apply to Petitioner's remaining attack on the issuance of additional charges. As just noted, during a break in the proceedings below, the Board issued additional charges

which resulted from information developed independently of the hearing. Petitioner's claim that the Board violated its own Rules and his vague, general claims of prejudice and due process and other constitutional violations, like his double jeopardy claim, have neither legal nor factual bases.

The Board's action was taken pursuant to Rules 2 and 8 of the Board's Rules of Procedure (See pp. 3, 4, *supra*) which provide as follows:

> RULE 2. NOTICE OF FORMAL PROCEEDINGS
>
> (a) After the investigation has been completed, if the Board concludes that formal proceedings should be instituted, the Board shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him . . .
>
> RULE 8. AMENDMENTS TO NOTICE OR ANSWER
>
> The Board, *at any time prior to its determination,* may allow or require *amendments to the notice of formal proceedings* and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense *against the matters charged thereby.* (Emphasis added.)

When the additional charges were issued, formal proceedings had, of course, already been instituted. Therefore, the charges were issued pursuant to Rule 2 *and* Rule 8. While Rule 2 specifies the procedures to be followed to file charges and *initiate* formal proceedings, Rule 8 is

applicable once formal proceedings have, in fact, been initiated since it provides that the Board may allow or require amendments to the notice of formal proceedings and that such amendment may set forth additional facts, whether occurring before or after the commencement of the hearing. That the Rule permits the filing of additional charges is made clear by the Rule's requirement that "if such an amendment is made, the judge shall be given a reasonable time both to answer the amendment and to prepare and present his defense against *the matters charged thereby*". (Emphasis added.)

The intent and authority of Rule 8 is clear and the State Supreme Court, in promulgating the Rule, properly recognized the distinction between a member of the judiciary as to whom no proceedings had been instituted and one as to whom proceedings had begun. Moreover, the court, in promulgating the rule, followed similar or identical rules in other jurisdictions, rules that have been upheld in the face of challenges similar to Respondent's in every jurisdiction that has considered them.

In *In re Carrillo*, 542 S.W.2d 105, 108 (Tex. 1976), the Supreme Court of Texas, in applying a Rule virtually identical to those at issue, outlined the Judge's challenges and answered them as follows:

> Judge Carrillo complains that he was denied due process in this proceeding because the Notice of Preliminary Investigation dated May 2, 1975, related only to alleged misconduct in receiving gifts and engaging in certain business transactions with a party to a lawsuit pending in his court; that he had no similar notice in accordance with Rule 3(b) when five additional charges were preferred against him in the Notice of Formal Proceedings served upon him on July 18, 1975, or when six additional charges were included in the Commission's First Amended Notice of Formal Proceedings dated

October 8, 1975. He complains further that the total of eleven additional charges of misconduct were not properly a part of the proceeding commenced by the May 2nd notice; that the Commission failed to specify in ordinary and concise language the additional charges against him; and that it failed to follow other procedures specified by the Rules of this Court for Removal or Retirement of Judges.

We find no merit in these procedural complaints. Our Rule 3(b) provides for the Commission to give a notice of preliminary investigation before finally determining that formal proceedings shall be instituted. The purpose is to give the judge an opportunity to reply to the charges then before the Commission before it acts with respect to formal proceedings. Judge Carrillo filed his reply on May 13, 1975. This did not mean that the Commission was prevented from preferring additional charges in its subsequent notice of Formal Hearings and its First Amended Notice of Formal Hearings, or that it should start all over by incorporating all charges in a new Notice of Preliminary Investigation. It is clear from our Rule 4 that it was the Notice of Formal Proceedings which officially and formally commenced his proceedings. Nothing in our Rules nor the concept of due process requires that the pleadings instituting formal proceedings, or amendments thereto, need be limited to matters contained in the verified statement initially incorporated by the Commission in its Notice of Preliminary Investigation, so long as due notice is given concerning the additional charges. Rule 11 specifically provides that a Master, or the Commission, at any time prior to reaching a decision, "may allow or

> require amendments to the notice of formal proceedings . . . ". Rule 11 continues: "The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing." Judge Carrillo was given every notice required by the Rules. He had ample opportunity to reply and did reply to the sum total of the twelve charges that were made against him in the First Amended Notice of Formal Hearing filed with the Master on October 8, 1975.

The Supreme Court of California, applying rules again virtually identical to those at issue, see *Roberts v. Commission on Judicial Performance*, 190 Cal.Rptr. 910, 661 P.2d 1064 (1983), answered the contention of a judge-petitioner that he could not be disciplined on a matter – a contact with another judge – because the charge was not included in the notice of formal proceedings but was added during the masters hearing in the matter as follows:

> We further reject petitioner's assertion that the commission was foreclosed from relying upon his telephone conversation with Justice Puglia by reason of its failure either to include that charge in the original notice of proceedings, or to amend that notice. Rule 911 of the Rules of Court authorizes the commission or the masters, at any time prior to the conclusion of the hearing, to amend the notice to conform to proof or set forth additional facts, so long as the judge is given a reasonable time to respond and defend against the amended charges. We see no constitutional deficiencies in this procedure. (See *McCartney v. Commission on Judicial Qualifications*, 12 Cal.3d 512, 519, 116 Cal.Rptr. 260; 526

P.2d 268 (1974).) Petitioner had an ample opportunity to rebut the amended charges (661 P.2d at 1068-69).[13]

The Board acted properly in reliance upon the Rules promulgated by the state Supreme Court.[14]

In re Ruffalo, 390 U.S. 544 (1968), cited by Petitioner, does not support his argument. Indeed, the decision in *Ruffalo*, serves to underscore the correctness of the Board's actions in issuing the additional charges. The petitioner in *Ruffalo* was accused of misconduct in 12 counts, including two counts charging him with soliciting clients through an agent. At the hearing, both the petitioner and the agent testified that the agent only investigated cases for the lawyer, including cases involving the agent's employer-corporation. Thereafter, an additional count was added charging petitioner with hiring the agent to investigate his own employer, using only the testimony already produced. This Court reversed, holding that the proceedings "became a trap when, after they are underway, the charges are amended *on the basis of testimony of the accused.*" *In re Ruffalo*, 390 U.S. at 550, (Emphasis added) and observed that:

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[13] So too, did Petitioner. As noted above, pp. 6-9, *supra*. Petitioner had approximately 160 days to prepare to meet the additional charges.

[14] Respondent's characterization (Pet. p. 24) of the Board's actions as "extraordinary, unprecedented, illegal and unheard of" ignores not only the decisions in California and Texas but also the fact that, in adding additional charges, the Board was following its own precedents in prior cases. For example, additional charges were added in a number of the Board matters reviewed in *In re Cunningham*, 517 Pa. 417, 538 A.2d 473 (Pa. 1988), including charges that a particular respondent provided false information to the F.B.I. or invoked his privilege against self incrimination before the investigating grand jury. See also *In re Braig*, 520 Pa. 409, 554 A.2d 493 (1989), in which the charges were amended three times.

> " . . . [S]erious prejudice to petitioner may well have occurred because of the content of the original [charges] . . . He may well have been lulled 'into a false sense of security' . . . that he rebut charges 4 and 5 by proof that [the agent] was his investigator rather than a solicitor of clients. In that posture he had 'no reason even to suspect' that in doing so he would be, *by his own testimony*, irrevocably assuring his disbarment under charges not yet made." *Id* at 553, note 4

The facts here are simply not comparable to *Ruffalo*. The nature or theory of the charges of misconduct against Petitioner did not change in the midst of the proceedings as in *Ruffalo*, thus introducing elements of unfair surprise and entrapment elements which are totally lacking here.[15]

Also totally lacking is any specification of the manner in which Petitioner was prejudiced or deprived of due process or other constitutional protections and Petitioner's general, conclusory allegations (Pet. p. 29) are without merit. Thus, while Petitioner claims that the manner in which the original charges would have been met would have been substantially different, he does not specify how it would have been or how he was harmed.[16]

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[15] And, of course, the charges here were brought *before* Petitioner testified. In fact, concern with the concepts of *Ruffalo* and the fairness of avoiding "setting a trap" for Petitioner was considered by the Board in determining to bring the additional charges concerning additional *ex parte* contacts by Petitioner prior to his testimony in these proceedings.

[16] Of course, this is so because he can not. His defense to the three *ex parte* contacts charged in the additional charges, contacts he himself characterized as involving "entirely different times, places, subject matter and parties" (Pet. p.7) were that such contacts did not occur, the same defense he had entered as to the *ex parte* contact charged in the original charges. What claim can be made that defense would or could have been

As already noted, he had more than ample time, approximately five months, to prepare his defense to the additional charges.

Finally, Petitioner's claim that the additional charges improperly polluted and corrupted the proceedings below is conclusively answered by the considerations set forth in Argument I, above pp. 13-18, validating the combination in the Board of investigative, prosecutorial, and hearing functions[17] and by the fact that, as discussed in answering the double jeopardy claim, a particular hearing panel does not decide to make a recommendation to the State Supreme Court, the Board does. Under the State Constitution and the Rules, it is the Board and not a hearing panel or panels that must, on the basis of the record, make the formal findings as to whether or not misconduct has occurred, see Rule 9(b), p. 4, *supra*, ("Upon receiving the report of the Committee, the Board shall make its findings . . . ") and Rule 14, p. 4, *supra*, ("If the Board, upon consideration of the record of the proceedings, finds good cause, it shall recommend . . . discipline . . . ") Thus, whether the charges are filed

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different if the three additional charges had been issued at the same time?

[17] Given the importance of the resolution of judicial disciplinary matters and their focus – the protection of the integrity of the judicial system and the public's confidence in that integrity – certainly no argument can be made that the body charged by the citizens of the Commonwealth of Pennsylvania with the responsibility of pursuing allegations of judicial misconduct, the Respondent Board, is powerless to exercise that responsibility if the alleged failure to conform to the standards of judicial conduct is that of a jurist already involved in proceedings involving his or her conformance to the standards or his or her fitness for continued judicial office. The Board would have violated its constitutional responsibilities if it had failed to pursue any additional allegations concerning Petitioner's judicial conduct of which it became aware.

and the record made before one, two, or five panels, it is the *Board*, not the hearing panels, that must review that record and make the final determination for the Board as to whether or not the record establishes that misconduct has occurred and a recommendation should be filed with the Supreme Court. And, of course, it is the state Supreme Court, not the Board, that makes the ultimate adjudicative determination.

CONCLUSION

The proceedings below were in conformity with the Constitutional standards and the issues raised by Petitioner do merit this Court's review. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. KEUCH
Solicitor
Judicial Inquiry and Review Board

June, 1993

SUPREME COURT OF PENNSYLVANIA

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD

JUDICIAL INQUIRY AND REVIEW BOARD OF THE SUPREME COURT OF PENNSYLVANIA	:	
Petitioner,	:	Board Matter Number 140
v.	:	
JUSTICE ROLF LARSEN,	:	
Respondent.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN

BEFORE ME, the undersigned NOTARY PUBLIC, appeared one Robert L. Keuch, who, being personally known to me and having been placed under oath as required by law, deposed and said as follows:

1. My name is Robert L. Keuch. I am employed by the Judicial Inquiry and Review Board as Executive Director and General Counsel.

2. As Executive Director and General Counsel for the Board, I am responsible for the conduct of the investigations and inquiries which are undertaken to carry out the Board's responsibilities. I am also the official custodian of the records of the Board.

. . .

5. As Executive Director and General Counsel, I am aware, of course, of the actions taken by the Board on the

matters before them. In addition, I have reviewed the official minutes of the Board in preparation for the execution of this affidavit. My independent recollection and the records of the Board demonstrate that once Judge Ross was informed that an inquiry would be conducted into the contact by respondent with her, she recused herself from any participation in the inquiry or proceedings in this matter. Specifically, Judge Ross did not participate in a determination to issue a letter of inquiry to the respondent concerning her contact and has not participated in any discussion concerning the results of the inquiry and did not participate in the vote to authorize the formal charges in this matter.

/s/_____
Robert L. Keuch

STATE OF PENNSYLVANIA)
) SS
COUNTY OF DAUPHIN)

Sworn to and subscribed before me this 27th day of June, 1988.

/s/_____
Notary Public

SUSAN J. DORN, Notary Public
My Commission Expires
March 14, 1991
Harrisburg, PA Dauphin County

NOTES OF TRANSCRIPT
NOVEMBER 15, 1988

" . . . [S]o far as a continuance is concerned, the continuance is granted in light of Mr. Peruto's unavailability since he is engaged in a trial in progress in the Federal Court which will not be over until December 2nd.

We do want to, however, schedule some days for hearing, and we would appreciate it if you would ask Mr. Peruto and Justice Larsen if they would let us know what parts, if any, of the previous hearing they expect to enter into the record here without redoing it, if there is any. In fact, what I would propose is that we order Mr. Keuch to meet with Mr. Peruto or whoever Mr. Peruto designates to meet in his stead sometime during this continuance which will be granted, to reach agreement, if possible, on those parts of the record, if any, which respondent agrees should be made part of the record of this hearing, and so that it is clear, our order is that this hearing is *de novo* and, therefore, the respondent will have to consider what parts, if any, of the previous hearing on charges one and two should be made part of the record of this hearing, and I would ask that the Board be notified no later than December 23rd, which would give everybody adequate time after December 2nd to notify us what parts, if any, and I emphasize if any, the respondent would care to have made part of the record of this hearing."

NOTES OF TRANSCRIPT
MARCH 15, 1989

"Gentlemen, do you have stipulations regarding the record of the proceedings relating to charges 1 and 2?

MR. KEUCH: Yes sir. It's my understanding that the record to date before the original panel on charges 1 and 2 will be now made a part of this record, and will state for the record, that every member the present panel [sic], eight of you, have been provided, as requested by respondent's counsel, with the entire record to date.

It would be my intention to, then, since at the end of that record, the board had closed its case, to move to reopen the board's case and to present evidence this morning on charges 3, 4 and 5.

THE CHAIRMAN: Very well.

MR. PERUTO: I don't know if all the members of the panel have read it. It's a voluminous record. I will so agree that we incorporate by reference what has gone before."